93-559

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

COLORADO STATE BOARD OF AGRICULTURE, in its capacity as the governing board of the Colorado State University,

Petitioner,

vs.

JENNIFER ROBERTS, JULIE OSBORNE, JANET BRUMBELOW, LAURA BIELAK, SARA STOUT, AMY RECOUPER, JENNIFER JACOBS, MALIA KUENZLI, STACIE STAFFORD, HEATHER NAKASONE, KIM JOHNSON, AIMEE RICE AINSWORTH, and LISA MIZE, in their individual capacities,

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Tenth Circuit

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QUESTIONS PRESENTED

1. Whether Title IX proscribes only intentional gender-motivated discrimination or whether it requires that the gender composition of a university's athletic programs mirror that of its student body.

2. Whether a federal court exceeds its authority to remedy a violation of Title IX by ordering a university immediately and permanently to reinstate a specific athletic program, rather than permitting a university to determine what athletic programs should be continued to eliminate the statistical imbalance.

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Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Tenth Circuit

The Colorado State Board of Agriculture, in its capacity as governing board of the Colorado State University, through its counsel, the Attorney General of Colorado, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is published at 998 F.2d 824 (10th Cir. 1993), and is reprinted at C-1 - C-24 of the appendix hereto. The opinion of the United States District Court for the District of Colorado is published at 814 F. Supp. 1507 (D. Colo. 1993), and is reprinted at App. A-1 - A-22. Subsequent orders of that court are contained in the transcript of the status conference of March 11, 1993 and are not otherwise published. The transcript of the status conference is reprinted at App. B-1 - B-27.

JURISDICTION

The court of appeals entered judgment on July 7, 1993. No petition for rehearing was filed. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Title IX of the Education Amendments of 1972 as amended, codified at 20 U.S.C. § 1681, provides in relevant part:

> (a) **Prohibition against discrimination; exceptions.** No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ..
>
> (b) **Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance**. Nothing contained in subsection (a) of this section shall be

> interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community . . ..

STATEMENT OF THE CASE

Petitioner, the Colorado State Board of Agriculture ("Board"), is charged under Colorado law with responsibility for the governance of the Colorado State University ("CSU"). *See* Colo. Rev. Stat. § 23-30-108. CSU is a state-supported land-grant institution providing higher education. CSU is located in Fort Collins, Colorado and is attended by approximately 15,000 full-time students. Because CSU receives federal funds for some purposes, it is subject to the requirements of Title IX of the Education Amendments of 1972. *See* 20 U.S.C. § 1687.

Like most universities, CSU has chosen to sponsor a number of intercollegiate sports teams. CSU's teams compete at the National Collegiate Athletic Association ("NCAA") Division I-A level, the highest level of competition and the level with the most athletic scholarships. Prior to 1970, CSU offered eleven intercollegiate sports for men, but none for women. App. at C-13. During the 1970s, CSU created eleven teams for women and reduced the number of men's teams to ten. *Id.*

Since 1980, budget constraints have necessitated across-the-board reductions in CSU's intercollegiate sports programs. Thus, by

the 1988-89 academic year, CSU had teams in eight men's sports[1] - and nine women's sports.[2] *Id.* at A-12. In that year, the United States Department of Education's Office of Civil Rights ("OCR"), the federal agency charged with administering Title IX,[3] terminated monitoring of CSU's athletic department that had begun in 1983, because CSU had "achieved compliance with Title IX . . . and its implementing regulation, 34 CFR Part 106."[4]

Despite ongoing budget concerns, no further intercollegiate teams were dropped until June 1, 1992. *See* App. at A-21. At that time, the President of CSU, Dr. Albert Yates, after consultation with CSU's Title IX coordinator, accepted the athletic department's budget-motivated recommendation that the men's baseball program (55 participants) and the women's softball program (18 participants) be discontinued. Dr. Yates' decision was ratified by the Board.

After implementing the decision to discontinue baseball and softball, CSU continued to sponsor *more* women's sports (8) than

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[1] CSU fielded men's varsity teams in baseball, basketball, cross country, football, golf, indoor track, outdoor track, and tennis.

[2] CSU fielded women's varsity teams in basketball, cross country, golf, indoor track, outdoor track, tennis, softball, swimming, and volleyball.

[3] The Department of Education is responsible for granting most of the federal financial assistance to educational institutions, and it may, after notice and an opportunity by the institution to achieve voluntary compliance, terminate federal funding of an institution violating Title IX. *See* 20 U.S.C. § 1682. Title IX also gives the Education Department authority to promulgate Title IX regulations. *Id.*

[4] *See* March 8, 1989 letter from Gilbert D. Roman, Regional Director of the Office for Civil Rights, to Dr. Philip E. Austin, President of CSU (App. D-1 - D-3) (praising CSU's intercollegiate program as one of which CSU "can be proud"). The letter and OCR's monitoring and approval of CSU's athletic programs are described in detail in the district court's opinion. *See* App. A-13 - A-16.

men's sports (7). And because baseball had 55 participants and softball only 18 participants, the net effect of these latest athletic department reductions was to *increase* the female athletic participation rate relative to male participation.[5] Moreover, after achieving certain reductions in its overall athletic department budget deficit, CSU targeted the remainder of the savings from discontinuing baseball and softball to increasing scholarships in other *women's* sports.[6] Given that OCR had found full compliance in 1989 and that the net effects were positive for women, there was every reason to believe that these cuts did not violate Title IX.

Despite the fact that CSU's decision how best to meet its athletic department budget constraints clearly favored female athletes relative to their male counterparts, on June 29, 1992, respondents, members of CSU's 1991-92 women's softball team, brought this suit, in their individual capacities, in the United States District Court for the District of Colorado challenging the university's action as discriminatory under Title IX. Respondents sought both damages and injunctive relief.[7]

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[5] During the 1988-89 academic school year, the gap between women's athletic participation and enrollment rates at CSU was 15.6 percentage points. App. A-12. By 1991-92, that gap had fallen to 12.7 percentage points. *Id.* at A-7. Termination of baseball and softball in 1992 further *decreased* the gap between women's participation and enrollment at CSU to 10.5 percentage points (women comprised 48.2% of the student body and 37.7% of the student-athletes). *Id.*

[6] Specifically, CSU intended to increase the number of women's scholarships in golf, tennis, and the three track sports (cross country, indoor track, and outdoor track) to the maximum level allowed by the NCAA.

[7] The suit was initially filed against CSU by seven of the thirteen respondents. The complaint sought only injunctive relief. Shortly thereafter, the Board was added as a defendant. On September 25, 1992, the six remaining respondents were added as plaintiffs in an amended complaint which for the first time sought damages. Trial on the issue of liability was held in November 1992, App. at A-2, and the parties subsequently settled

Respondents did not allege intentional discrimination. Nor did they rely on the language of Title IX itself. Rather, they contended that CSU's decision to discontinue its softball program violated the implementing regulation, 34 CFR Part 106, with which OCR had found CSU in full compliance only three years earlier. Specifically, respondents alleged a violation of a portion of the regulation's command that federal fund recipients "provide equal athletic opportunities for members of both sexes," 34 CFR § 106.41(c), notwithstanding the fact that women now have a *greater* share of the athletic opportunities at CSU than in 1989 when CSU's athletic program was approved by OCR (and also a greater share than prior to the changes that triggered this litigation).

On February 18, 1993, the district court, citing only CSU's "violation" of *one* of ten nonexclusive factors that the implementing regulations instruct *OCR*[8] to "consider" in determining whether equal athletic opportunities are available (and thus whether to take action with respect to a recipient's federal funding) found CSU in violation of Title IX.[9] In so holding, the court rejected the Board's argument

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the damages claims.

[8] The implementing regulations were promulgated in 1975, long before this Court held that there was an implied private right of action under Title IX. *See Cannon v. University of Chicago*, 441 U.S. 677 (1979).

[9] 34 CFR § 106.41(c) provides in relevant part:

> **(c) Equal Opportunity**. A recipient . . . shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director [of OCR] will *consider*, among other factors:
>
> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
> (2) The provision of equipment and supplies;
> (3) Scheduling of games and practice time;

that a private Title IX plaintiff must at a minimum prove an overall violation based upon *all* of the factors the implementing regulation directs OCR to consider. App. A-35 (relying on OCR's "Title IX Athletics' Investigator's Manual," which notes that in "unique circumstances" "an [agency] investigation may be limited").

The court based its conclusion that CSU had "violated" the administrative consideration in question -- "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes," 34 CFR § 106.41(c)(1) -- on a 1979 OCR "Policy Interpretation." *See Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71413 (1979). The Policy Interpretation provides that *OCR*[10] may assess whether an institution

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(4) Travel and per diem allowance;
(5) Opportunity to receive coaching and academic tutoring;
(6) Assignment and compensation of coaches and tutors;
(7) Provision of locker rooms, practice and competitive facilities;
(8) Provision of medical and training facilities and services;
(9) Provision of housing and dining facilities and services;
(10) Publicity.

> Unequal aggregate expenditures . . . for male and female teams . . . will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(emphasis added).

[10] The *Policy Interpretation*, which was promulgated by the Department of Education's predecessor agency, the Department of Health, Education and Welfare, was also proposed before this Court held that there was an implied private right of action under Title IX.

"effectively accommodates" interests and abilities "in any one of the following ways: (1) participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments"; or (2) "the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the under-represented sex"; or (3) "it can be demonstrated that the interests and abilities of the members of the [under-represented sex] have been fully and effectively accommodated." 44 Fed. Reg. at 71418.

The district court, treating this excerpt from the Policy Interpretation as a rigid three-part test for Title IX compliance in private suits, held as a matter of law that because CSU had a 10.5% "gap" between female athletic participation and female undergraduate enrollment -- a gap approximately *half* that of the *average* NCAA Division I-A institution, (and only two-thirds the size of the gap at CSU five years earlier), -- participation opportunities at CSU were not "substantially proportionate." App. A-9 - A-10. The court acknowledged that it made this finding notwithstanding the fact that the female athletic participation rate at Colorado high schools, the pool from which CSU draws most of its varsity athletes, differed only slightly from the rate at CSU. *Id.* at A-15. With regard to the relative level of female participation that *would* achieve "substantial proportionality," the court noted only that a 1.7% gap might be "acceptable." *Id.* at A-20. Currently, there is only *one* NCAA Division I-A institution *in the entire country* with a significant female enrollment, Washington State University, where there is such close parity between female participation in intercollegiate athletics and female undergraduate enrollment.[11]

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[11] Tr. at 796 (Testimony of Dr. Lopiano). Moreover, Washington State University reached parity after the Washington Supreme Court interpreted the Washington Constitution as mandating statistical parity between athletic participation and enrollment rates. *See Blair v. Washington State Univ.*, 108 Wash. 2d 558, 740 P.2d 1379 (1987).

The court also held that CSU could not demonstrate a "continuing practice of program expansion," because CSU's intercollegiate athletic programs, like those of most universities, had expanded dramatically in the 1970s but had been shrinking in recent years in response to significant budgetary constraints, thereby decreasing the total number of athletic opportunities for *both* male and female student-athletes. App. at A-11. Finally, respondents' own testimony "about their dedication to the sport of softball," *id.* at A-17, convinced the court that the athletic interests and abilities of CSU students -- namely the respondent softball players themselves -- were not being "fully and effectively accommodated." *Id.* at A-20.[12]

Thus, by taking a budgetary action, which was in no way motivated by gender, and which actually *favored* female student-athletes relative to their male counterparts, CSU was held to have discriminated against women in violation of Title IX. The district court refused even to consider evidence of CSU's good faith and the lawful motivations underlying its decision to terminate baseball and softball, because "good intentions . . . do not negate a violation of Title IX." App. at A-21.

Further, although neither Title IX, the implementing regulations, the *Policy Interpretation*, nor even the OCR "*Investigators' Manual*" in any way suggests that compliance with Title IX *ever* requires an educational institution to sponsor a team in any particular sport, the district court issued an injunction directing the Board immediately and permanently to reinstate the women's softball program with all of the benefits accorded other varsity

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[12] In addition to these findings with respect to softball, the district court *sua sponte* found unaccommodated interest sufficient to justify adding women's soccer and alpine skiing teams at CSU. App. at A-19-A-20.

teams.[13]

The court of appeals affirmed in all relevant respects.[14] The court expressly rejected the Board's argument that a Title IX plaintiff must prove that the challenged action was motivated by impermissible gender-based considerations. App. at C-18 - C-19. Instead, the court held that proof of disparate impact alone is sufficient to place an affirmative duty on an educational institution to favor members of the "under-represented sex," either by continually adding new teams for the under-represented sex or by providing intercollegiate athletic opportunities for *100%* of the willing and able members of that sex (regardless of what portion of willing and able members of the over-represented sex receive such opportunities). *Id.* at C-10 - C-17.

The court acknowledged that Congress expressly provided that:

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[13] The district court subsequently ordered the Board to: (1) appoint immediately an interim head coach; (2) complete the selection process for a permanent head coach on or before June 1, 1993; (3) begin active recruiting of softball players so that CSU could have a "competitive" or "first class" varsity team; and (4) schedule a fall exhibition season. *See, e.g.*, App. at B-5 - B-6 ("THE COURT: Well, I had a really good idea driving home last night. It seems to me that I heard . . . that the baseball coach was . . . still a CSU employee. What about the baseball coach being acting [softball] coach"); *Id.* at B-15 ("THE COURT: . . . We've already talked about the insurance and the coach and the fall season and the contact of Mr. Mason to see if he can fill in and get some recruiting started . . .. I really would like you to rethink this idea of the playing field").

[14] Although the court of appeals found that the district court should not have placed the burden of proving "effective accommodation" on CSU, it affirmed the district court's finding on that issue after reconsidering the record itself "placing the burden of proof on the plaintiffs." App. C-14 - C-15. The court of appeals reversed only the order that CSU schedule a fall softball exhibition season, and emphasized that, while the recruiting ordered by the district court did have to take place, the softball team did not have to be "competitive" or "top flight." *Id.* at C-23.

> [n]othing contained in [Title IX] shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in . . . any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community. . . .

20 U.S.C. § 1681(b). Nevertheless, relying on its interpretation of the implementing regulations, as informed by the OCR *Policy Interpretation* and the OCR *Investigator's Manual*, the court concluded that a statistical imbalance *can* violate Title IX and subject the defendant to injunctive relief expressly designed to reduce the imbalance. App. at C-10 - C-11 ("Because an institution is not required to maintain gender balance, it is fair to conclude that proving an imbalance lies with the plaintiff").

The court of appeals also agreed with the district court that the administrative considerations listed in the implementing regulation could be turned into a "test," and that an institution may violate Title IX simply by failing to "comply" with *one* of those considerations. App. at C-7 - C-8. Then, following the district court's lead, the court of appeals found that CSU's "violation" of the three-part "Effective Accommodation test" outlined in the *Policy Interpretation* as a means of assessing compliance with one of the administrative considerations established an irrebuttable presumption that the university was in violation of Title IX. *Id.* at C-10 - C-17.

The court recognized that in these "times of economic hardship, few schools will be able to satisfy [Title IX] by continuing to expand their women's athletic programs." *Id.* at C-13. Indeed, the court noted, the only solution open to schools with limited athletic department budgets is to *cut* their existing men's programs until substantial parity is reached. *Id.* The court made clear, however, that budget cuts at institutions which do not presently have parity

between female athletic participation and enrollment -- *i.e. all* educational institutions -- can *never* include women's teams, because any such cuts would automatically establish unaccommodated interests and abilities (namely, those of the displaced athletes) in violation of Title IX.[15] Thus, the current rule in the Tenth Circuit is that notwithstanding any other relevant and even compelling considerations, no school which has not achieved strict proportionality may never discontinue a women's program for any reason. This is true even if the net effect of the total change proposed by the school improves proportionality.

Finally, although it acknowledged that there are several ways of correcting a violation of Title IX, the court of appeals determined that once a violation is established, a district court is free to disregard the university's judgment as to which path to "substantial proportionality" best serves the particular needs and circumstances of that institution and to *mandate* a particular corrective course of action. Specifically, the court of appeals upheld the district court's order that CSU immediately and permanently establish a women's intercollegiate softball team and recruit women to attend CSU in future years for the purpose of playing softball.

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[15] Indeed, the court indicated that interest and ability in an intercollegiate sport may exist whenever there is a club sport or where there has been a team in the past. *Id.* at C-16. *See also Cook v. Colgate Univ.*, 802 F. Supp. 737 (N.D. N.Y. 1992), *vacated as moot*, 992 F.2d 17 (2d Cir. 1993).

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS AND WITH THE DECISIONS OF THIS COURT.

This case presents issues of pressing and recurring importance to thousands of higher educational institutions and high schools across the country. Most such institutions, both state and private, have chosen to sponsor and fund intercollegiate or interscholastic athletic programs for their students. The primary mission of educational institutions is education, however, and, in the face of budgetary constraints, many have found it necessary in recent years to scale back their extracurricular offerings, including intercollegiate or interscholastic sports.[16]

At issue here is what discretion Title IX leaves an educational institution in tailoring its intercollegiate or interscholastic athletic program, within budgetary limitations, to the specific interests and abilities of its student-athletes. Clearly, Title IX places some restrictions on that discretion; the plain language of the statute prohibits an institution from discriminating in favor of -- that is, intentionally preferring -- student-athletes of one gender. What impact, if any, Title IX has beyond such gender-motivated decisions, however, remains unresolved. Specifically, the question whether a Title VII-type statistics-based "disparate impact" theory is available to private Title IX plaintiffs has fostered considerable confusion and conflict among the lower courts, and the decision below adds to an existing conflict among the circuits on that issue.

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[16] Over 65% of college athletic departments operate at a loss. NCAA, *Revenues and Expenses of Intercollegiate Athletics Programs; Analysis of Financial Trends and Relationships, 1985 - 1989*, 54, Table 4-2 (1989).

Moreover, because the court of appeals looked to Title IX's implementing regulations as alternative authority for its disparate impact theory, this case also raises a broader recurring issue with significant implications that reach beyond Title IX: the circumstances, if any, under which a federal agency may proscribe, as discriminatory, conduct which the statute itself does not prohibit. *See Guardians Ass'n v. Civil Service Comm'n of New York*, 463 U.S. 582 (1983). The decision below extends the scope of agency (and judicial) authority in this regard beyond that recognized in prior decisions, and this Court should grant the petition to fix the limits of this controversial doctrine both in the Title IX context and elsewhere.

The decision below also creates a conflict among the circuits with regard to whether a federal court exceeds its authority to remedy a statistics-based violation of Title IX by ordering a university to sponsor and fund a particular athletic program rather than permitting the university itself to choose how to modify its mix of sports offerings to eliminate the statistical imbalance declared unlawful by the court. Because issues of state-federal relations and academic freedom are implicated, this conflict alone warrants granting the petition.

These issues are of exceptional importance. Despite devoting enormous time and resources to questions of Title IX compliance -- including, as in the Board's case, hiring special Title IX compliance officers[17] -- educational institutions currently have no way to determine which, if any, approaches to managing their limited budgets will shield them from costly and intrusive monetary and equitable Title IX penalties. This uncertainty both creates perverse incentives and fosters absurd results antithetical to the purposes underlying Title IX.

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[17] *See also* NCAA, *Preliminary Report of the Task Force on Gender Equity* (1993).

A. THE HOLDING OF THE COURT BELOW, THAT A VIOLATION MAY BE FOUND WITHOUT PROOF OF INTENTIONAL DISCRIMINATION, CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND WITH THE DECISIONS OF THIS COURT.

As this Court recently noted in *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2751 (1993), federal courts have no authority to impose liability under a federal antidiscrimination law unless the defendant "*has unlawfully discriminated*." (emphasis original). "Unlawful discrimination" generally has proven difficult to define, however, and the lower courts have reached conflicting conclusions regarding the conduct proscribed by Title IX.

Title IX states simply that no individual may be excluded from a federally funded program "on the basis of sex." 20 U.S.C. § 1681(a). In *Cannon v. University of Chicago*, 648 F.2d 1104, 1109 (7th Cir.), *cert. denied*, 454 U.S. 1128 (1981), the Seventh Circuit held that "a violation of [Title IX] requires an intentional discriminatory act and that disparate impact alone is not sufficient to establish a violation." Similarly, this Court has interpreted its decision in *Guardians* as holding that a virtually identical provision of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, "reache[s] only instances of intentional discrimination." *Alexander v. Choate*, 469 U.S. 287, 293 (1985).[18]

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[18] "Title IX was patterned after Title VI of the Civil Rights Act of 1964." *Grove City College v. Bell*, 465 U.S. 555, 566 (1984). *See also* Sex Discrimination Regulations: Hearings Before the House Subcommittee on Post Secondary Education of the Committee on Education and Labor, 94th Cong., 1st Sess. 16, 150 (1971) ("the setting up of an identical administrative structure and the use of virtually identical statutory language substantiates the intent of Congress that the interpretation of Title IX was to provide the same coverage as had been provided under Title VI")

The court below expressly rejected this approach. "[D]espite the fact that Title IX was explicitly modeled on Title VI," the court held that "Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e [*et seq.*], 'is the most appropriate analogue when defining Title IX's substantive standards.'" App. at C-18 - C-19 (*quoting Mabry v. State Bd. of Community Colleges & Occupational Educ.*, 813 F.2d 311, 316 n.6 (10th Cir.), *cert. denied*, 484 U.S. 849 (1987)). Because proof of discriminatory intent is not required under Title VII, *see Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971); 42 U.S.C. § 2000e-2(k), the court reasoned, a statistics-based cause of action for disparate impact is also available under Title IX. App. at C-18.[19]

The First Circuit has also recently weighed in on the issue, and its approach appears to fall somewhere in between the diametrically opposed approaches of the Seventh and Tenth Circuits. *See Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993). Although that court failed to follow the Seventh Circuit's lead by requiring Title IX plaintiffs to prove discriminatory intent, it also eschewed the Title VII "pure disparate impact" model adopted by the Tenth Circuit. Instead, the First Circuit held that "a Title IX plaintiff . . . must accompany statistical evidence of disparate impact with some further evidence of discrimination . . .." *Id.* at 895.[20]

(Comments of Senator Bayh).

[19] *See also Favia v. Indiana Univ. of Pennsylvania*, 812 F. Supp. 578 (W.D. Pa. 1993); *Sharif v. New York State Educ. Dep't.*, 709 F. Supp. 345, 360 (S.D.N.Y. 1989).

[20] The court specifically identified an "unmet need amongst the members of the disadvantaged gender." *Id* at 895. The court, however, failed to explain how proof of *some* "unmet need" among members of the under-represented gender in any way evidences "discrimination," since there could well be as much or more unmet need among members of the other gender. And a comparison of the relative levels of unmet need (which the court expressly rejected, *id.* at 899) would merely be additional disparate impact

There is a square conflict among the circuits on the issue of whether Title IX bars only intentional discrimination or whether it places upon educational institutions affirmative obligations to ensure that the gender composition of their athletic departments mirror the gender compositions of their student bodies. The importance of this issue is significant; it affects virtually every educational institution in the country. These schools face the imponderable task of deciding how to allocate their limited resources in a manner that complies with Title IX and the judicial gloss applied by the Seventh, Tenth and First Circuits. Accordingly, this important question of federal law should be settled by the Court. *Cf. Guardians*, 463 U.S. at 597 (White, J., plurality) ("[s]ince the private cause of action . . . is one implied by the judiciary rather than expressly created by Congress, we should . . . take care in defining the limits of this cause of action").

B. THE HOLDING OF THE COURT BELOW, THAT AN AGENCY MAY IMPOSE TITLE IX LIABILITY ON THE BASIS OF DISPARATE IMPACT EVEN THOUGH TITLE IX PRECLUDES DISPARATE IMPACT LIABILITY, CONFLICTS WITH THIS COURT'S NARROW HOLDING IN *GUARDIANS ASS'N V. CIVIL SERVICE COMM'N.*

Because the court of appeals looked to Title IX's implementing regulations as alternative authority for upholding the district court's disparate impact judgment against the Board, this case also raises a broader recurring issue with significant implications that reach beyond Title IX: the circumstances, if any, under which a federal agency may

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evidence. Nor did the court explain how "unmet need" constitutes an additional hurdle for Title IX plaintiffs, since the mere existence of the displaced plaintiff student-athletes presumably establishes "unmet need."

proscribe, as discriminatory, conduct which the statute itself does not prohibit. To date, that controversial proposition has found support only in the context of the Title VI regulations at issue in *Guardians*. Those regulations left no doubt that the relevant agencies specifically intended to proscribe conduct which had a disproportionate impact on members of one race, regardless of the motivations underlying that conduct.[21] And in *Guardians* five members of this Court, in multiple opinions, held that, although Title VI is violated only by intentionally discriminatory actions, actions having "an unjustifiable disparate impact on minorities could be redressed through agency regulations," because *Congress* in Title VI "*delegated to the agencies* . . . the complex determination of what sorts of disparate impacts . . . [are] remediable." *Alexander*, 469 U.S. at 293 (emphasis added).

The court below, purporting to rely upon this Court's opinions in *Guardians*, extended the principle developed there far beyond the narrow *Guardians* context approved by this Court. Specifically, the court held that even in the face of a statutory provision that appears absolutely to preclude disparate impact liability, *see* 20 U.S.C. § 1681(b),[22] a court may impose such liability if the agency so authorizes. In addition, the court eschewed any notion that the

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[21] *See, e.g.*, 24 CFR § 1.4(b)(vii)(2)(i) (prohibiting housing decisions which "have the *effect* of subjecting persons to discrimination because of their race, color, or national origin, or have the *effect* of defeating or substantially impairing accomplishment of the objectives of the program or activity as respect to persons of a particular race, color, or national origin") (emphasis added).

[22] As noted above, 20 U.S.C. § 1681(b) provides that nothing in Title IX "shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in . . . any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community . . . ."

agency must in the implementing regulations clearly express its intent that liability be available on a statistical imbalance theory. Rather, the court held, agency intent to expand the scope of liability may be *inferred* from, *inter alia*, agency policy interpretations and manuals.

Thus, the Tenth Circuit has ruled that not only regulations, but also policy interpretations and agency manuals, may extend statutory prohibitions. It has done so in the case of a statute whose regulations are *not* inconsistent with the statute and have been misread by the lower courts. In fact, there is significant evidence that OCR did *not* intend its regulations to authorize disparate impact liability. The final version of the regulations deleted proposed language that would have required educational institutions to make affirmative efforts to provide "athletic opportunities in such sports and through such teams as will most effectively equalize such opportunities for members of both sexes." *Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance*, Proposed Rule, 39 Fed. Reg. 22228, 22236 (1974). OCR explained that since the proposed language "could be considered 'affirmative action' . . . [this section] has been deleted." *Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance*, Final Regulation, 40 Fed. Reg. 24128, 24134 (1975). Similarly, the proposed policy interpretation made it clear that:

> The Title IX regulation does not require an equal number of men and women participants or an equal number of men's and women's sports. Rather, it requires that the interests and abilities of men and women be equally accommodated.

Proposed Policy Interpretation, 43 Fed. Reg. 58070, 58074 (1978). Certainly, there is no *clear* indication that OCR meant through its implementing regulations to proscribe any conduct other than the gender-motivated discrimination prohibited by Congress.

In "interpreting" the implementing regulations, the court of

appeals effectively transformed Title IX from an antidiscrimination statute into a law that imposes affirmative statistical obligations on all educational institutions that choose to sponsor intercollegiate or interscholastic athletics. Even assuming that there is some correlation between relative male/female college enrollment and the respective groups' interest and ability to participate in intercollegiate varsity sports,[23] a serious question exists whether in these circumstances inferring agency "intent" to allow disparate impact liability furthers *congressional* design -- as this Court found it did in *Guardians* -- or foils that design and constitutes impermissible agency or judicial legislation.

Whatever the merit of the Tenth Circuit's approach, however, it surely represents a major extension of the disputed principle espoused by the *Guardians* majority. The importance of this issue -- both to OCR and other agencies that administer federal antidiscrimination statutes and to the countless private and public institutions subject to such regulation -- cannot be overstated. Indeed, this issue alone is worthy of this Court's immediate review.[24]

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[23] In fact, NCAA statistics show that male "walk-ons" -- *i.e.*, student-athletes who compete without scholarships -- outnumber female counterparts by 3-to-1. NCAA, *Gender Equity Study: Summary of Results* 4 - 5 (1992). *See also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) ("[w]hen special qualifications are required . . ., comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value"); *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 n.13 (1977) (rejecting assumption that members of one race will choose particular lines of employment "in lockstep proportion to their representation in the local population" as "completely unrealistic").

[24] Moreover, although this Court has long recognized that under certain antidiscrimination statutes, statistical evidence of disparate impact may establish a *prima facie* case of unlawful discrimination -- rebuttable upon a showing of business or educational necessity, *see, e.g.*, *Connecticut v. Teal*, 457 U.S. 440, 446-47 (1982); *Debra P. v. Turlington*, 644 F.2d 397, 407 (5th Cir. 1981) -- this case apparently represents the first time that a court

C. BY IMPOSING A REMEDIAL SCHEME WHICH DENIES ANY INSTITUTIONAL DISCRETION AND WHICH MANDATES THE PERMANENT ADDITION OF A PARTICULAR SPORT, THE COURT BELOW CONTRADICTED THE RULE OF THE FIRST CIRCUIT.

In addition, the remedial scheme imposed by the courts below is in direct conflict with the rule of the United States Court of Appeals for the First Circuit in *Cohen*. In *Cohen* members of Brown University's women's gymnastics and volleyball teams sought reinstatement of those programs to varsity status (from the "club" status to which the university had assigned them). The district court granted the plaintiffs a preliminary injunction pending trial on the issue of Title IX liability. Although the First Circuit upheld the district court's *temporary* injunction, it observed:

> We are a society that cherishes academic freedom and recognizes that universities deserve great leeway in their operations. . . . The district court has noted, we believe appropriately, that if it ultimately finds Brown's athletic program to violate Title IX, it will initially require the University to propose a compliance plan rather than mandate the creation or deletion of particular athletic teams. . . . [T]he many routes to Title IX compliance make specific relief most useful in situations where the institution, after a judicial determination of non-compliance, demonstrates an unwillingness or inability

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has sanctioned an approach that creates an *irrebuttable* presumption of unlawful discrimination upon evidence of statistical imbalance. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 997-98 (1988) (recognizing importance of allowing defendant an opportunity to rebut statistical evidence).

> to exercise its discretion in a way that brings it into compliance with Title IX.

Id. at 906-07. Thus, the First Circuit, in square conflict with the Tenth, permits an educational institution found after trial to have violated Title IX to devise its own method of achieving compliance, and, absent a refusal or inability to do so, courts in the First Circuit may not intrude on the institution's discretion how best to allocate its limited resources consistent with the requirements of Title IX.

The *Cohen* court also ruled that "Title IX does not require [educational] institutions to fund any particular number or type of athletic opportunities -- only that they provide those opportunities in a non-discriminatory fashion if they wish to receive federal funds." *Id.* at 906. Thus, in the First Circuit, if an institution loses a Title IX suit brought by gymnasts and volleyball players, it is under no obligation to have a women's gymnastics or volleyball team so long as it achieves Title IX compliance by other means.

In contrast, in the Tenth Circuit, *federal courts* will in the first instance dictate how state and private educational institutions must comply with Title IX. Moreover, in the Tenth Circuit, the federal courts are free to mandate the *permanent* addition of a particular sport desired by the plaintiffs,[25] and thus can impose a method of compliance on a state institution which is far more expensive than

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[25] Although the respondents will lose standing to seek enforcement of the lower courts' orders upon the exhaustion of their athletic eligibility, *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 430 (1976), new softball players, who must be recruited in order to comply with the lower court's order, presumably can stop any future effort to discontinue the softball team by asserting that their interests and abilities are not being accommodated.

many of the alternatives.[26] Indeed, under the decision of the lower court, the Board is given less discretion in remedying a purported *unintentional* Title IX violation than school districts which have intentionally denied basic educational benefits on the basis of race. *See, e.g., Missouri v. Jenkins*, 495 U.S. 33, 51 (1990) ("[t]he very complexity of the problems of financing and managing a . . . public school system suggests that 'there will be more than one constitutionally permissible method of solving them'. . . . By no means should a district court grant local government *carte blanche*, . . . but local officials should at least have the opportunity to devise their own solutions to these problems") (citations omitted).[27] As a result, the Board is here precluded from making changes to its athletic programs which will more effectively serve the interests and abilities of its women students and at the same time achieve greater proportionality. Educational institutions across the

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[26] In addition to being unduly intrusive, this remedial approach does not even correct the purported violation of Title IX. Even after reinstating women's softball, CSU will not meet the court's definition of "substantial proportionality," will not have "a history and continuing practice of program expansion," and cannot state that each and every interest of female student-athletes is being "effectively accommodated." Therefore, the remedy ordered by the lower court merely grants the respondents what they wanted and invites further Title IX litigation against CSU.

[27] OCR has long recognized that its regulations grant higher education institutions discretion to comply with the equal opportunity requirement in a way they find most appropriate in light of all relevant considerations. The *Policy Interpretation*, for example, states that OCR investigators must

> resolve violations by obtaining a voluntary compliance agreement from the recipient. This is done through negotiations between [OCR] and the recipient, the goal of which is agreement on steps the recipient will take to achieve compliance . . .. When agreement is reached, [OCR] notifies the institution that its plan is acceptable.

Policy Interpretation, 44 Fed. Reg. at 71418.

country have a pressing need to know which of these two remedial approaches is consistent with Title IX.

II. THE HOLDING OF THE COURT BELOW HAS PROFOUND IMPLICATIONS FOR EVERY EDUCATIONAL INSTITUTION WHICH SPONSORS INTERCOLLEGIATE OR INTERSCHOLASTIC SPORTS.

This case also warrants review because of the far-reaching practical implications of the decision below on educational institutions across the country. Much more is at stake than the future of a single intercollegiate softball team. Presently over 1,250 colleges and universities field intercollegiate athletic programs,[28] and some

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[28] This number is derived adding the NCAA membership to the membership of the National Association for Intercollegiate Athletics. Of this number, 58% are field intercollegiate football programs. This is significant because, according to NCAA statistics, the average college football team has a roster of in excess of 100 student athletes and there is no female sport that can counterbalance these numbers. Thus, the mere fielding of a football team renders compliance with the Tenth Circuit's substantial proportionality requirement virtually impossible. *Compare* Komer, *Deputy Assistant Secretary's Memorandum of April 15, 1991, Concerning Technical Assistance Documents for Title IX Intercollegiate Athletics National Enforcement Strategy* at 9 ("Offering football can result in a lot of imbalances in an athletics program. Those imbalances can be acceptable under Title IX as long as, overall, benefits and services provided to women's teams are equivalent to those provided to men's teams").

Illustrative of the significance of football to any statistical analysis is the case at CSU. During the 1992-93 school year the district court found that women had 120 intercollegiate athletic participation opportunities and men had 198. If CSU's 105 person football squad is deducted from the male number of 198, female student-athletes outnumber their male counterparts by 50. Unless football -- or all other male sports programs -- are dropped, achieving numerical parity is difficult. There is certainly no evidence that Congress intended this result.

400,000 persons compete regularly on intercollegiate athletic teams. Moreover, although the Title IX issues raised here arise in the university setting, most, if not all, high schools also receive federal funds. Thus, they are subject to the requirements of Title IX. *See, e.g.*, 34 CFR § 106.41(d).[29] Because most schools have male and female enrollments that are approximately equal, the Tenth Circuit's unrealistic substantial proportionality test places virtually all of these educational institutions in violation of federal law.

Moreover, under the holding below, all colleges and universities that sponsor intercollegiate sports will *eventually* have to have precise alignment between participation rates and enrollment rates, *regardless* of whether the members of both genders actually wish and are able to participate at the levels reflected by their enrollment. If a school does not reach substantial parity, it invites federal courts to add to its budgetary problems by adding as many teams as federal judges think are necessary to accommodate the interests and abilities of the under-represented gender.

The practical implications of the court's decision stand Title IX on its head in at least three ways. First, the court's decision creates distorted incentives for college and university decision-makers that ultimately will thwart the very goal of Title IX -- namely, to achieve gender equity. The Tenth Circuit has made it plain that continued expansion is one way to achieve compliance with Title IX. Yet, under the court's holding, once a team for an under-represented gender is added, it can *never* be eliminated as long as that group remains under-represented, because the mere existence of the displaced athletes establishes "unaccommodated interests and abilities." Indeed, under the lower court's holding, once a team is established, the university has an affirmative obligation to maintain

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[29] Local school districts receive federal funds under a variety of statutes including 20 U.S.C. § 1401 *et seq.*; 20 U.S.C. § 2701 *et seq.*; 20 U.S.C. § 2911 *et seq.*; 20 U.S.C. § 2982 *et seq.*; 20 U.S.C. § 3171 *et seq.*

that sport by *recruiting* students with the requisite interests and abilities. The permanency of this "one-way ratchet" with which the court's decision imbues teams of the under-represented gender is clearly an enormous disincentive ever to add new teams for the under-represented gender, a result utterly inconsistent with the intent of Title IX.[30]

Second, the decision below actually penalizes those schools which, like CSU, attempted to comply with Title IX the fastest by making them most vulnerable to legal challenges. Thus, because CSU moved dramatically in the 1970s to remedy inequality by creating numerous new sports opportunities for women -- ultimately resulting in a *greater* number of women's teams at CSU than men's teams -- it is now "locked in" to those offerings, and cannot respond to current budgetary constraints by making fiscally sensible, even-handed cuts in athletics for *both* men and women.

Educational institutions, including high schools, face unprecedented financial difficulties from which athletic departments have not been immune. The NCAA, the governing body for much of college athletics, has passed a variety of cost-containment measures, and individual institutions have also moved to address the issue, frequently by making reductions in program offerings. But under the court's analysis, even if an institution is prepared to make dramatically greater reductions in men's team participation numbers, it may *never* reduce or eliminate offerings to women; the ability of the Board and other schools like it to make decisions that best

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[30] The decision below also discourages other means of increasing female intercollegiate athletic opportunities. One such method is the provision of more athletic scholarships in women's sports, which was an intended use by the Board of the very funds saved by cutting the men's baseball and the women's softball team. Others include upgrading facilities and improving coaching and training. Faced with the prospect of indeterminable cost increases from court-ordered team additions, however, institutions are likely to cut back on expenditures in these other important areas.

accommodate students' needs and fiscal constraints has effectively been eliminated.

Third, if a university finds itself in the increasingly common circumstance of lacking funds to expand its athletic programs, and is thus unable to satisfy the "continuing practice of expansion" prong of what the Tenth Circuit has determined is the "test" for compliance with Title IX, it can fulfill that test only by eliminating men's teams. As this case demonstrates, if an educational institution chooses to eliminate one sport currently offered to each gender, then the team members of the under-represented gender may through Title IX force the reinstatement of their team on the ground that their interests and abilities are not being fully accommodated. In contrast, the team members of the over-represented gender are entitled to nothing even though their injury, loss of the team, is every bit as great as the injury to the team members of the under-represented sex. In effect, the mere gender of the participants makes certain programs sacrosanct. Educational institutions under financial strain are thus *prohibited* by Title IX from making gender-neutral decisions. Ironically, the decision below requires such schools intentionally to discriminate against men solely on the basis of sex in order to satisfy Title IX's command that "[n]o person . . . shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

The absurd results mandated by the Tenth Circuit approach are amply illustrated in a recent Illinois district court opinion, which expressly relied on the decision below. *See Kelley v. Board of Trustees of the Univ. of Illinois*, ___ F. Supp. ___, 1993 WL 334771 (C.D. Ill. Sept. 1, 1993). In that case the university, in response to budget constraints, cut only male athletic opportunities. The court found that the motivation for this approach was compliance with Title IX and a "gender equity" policy of the Big Ten conference. The displaced male athletes challenged the university's decision as intentional discrimination in violation of Title IX. The court accepted

the plaintiffs' characterization of the university's action as intentional gender-based discrimination, but nonetheless granted the *university's* motion for summary judgment. *See id.* at ___, 1993 WL 334771 at 6. ("The Court is not unsympathetic to the plight of members on the men's swimming team and recognizes that Congress, in enacting Title IX, probably never anticipated that it would yield such draconian results"). Thus, conduct clearly prohibited by Title IX is encouraged -- indeed, mandated -- while conduct not reached by the statute and, at best, only hinted at in the regulations, is severely penalized.[31]

The clear effect of the Tenth Circuit's holding is to place an affirmative duty on educational institutions to prefer members of the "under-represented gender," either by continually adding new teams for the under-represented gender or by providing intercollegiate or interscholastic athletic opportunities for *100%* of the willing and able members of that gender (regardless of what portion of willing and able members of the over-represented gender receive such opportunities). As a result, the lower court's holding will lead to a revolutionary restructuring of intercollegiate and interscholastic athletic departments. Before such wholesale, and potentially irreversible, changes are allowed to take place, this Court should

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[31] In light of the earlier decisions of the First and Tenth Circuits, it is difficult to criticize the *Kelley* court's decision to read the prohibition on intentional discrimination out of Title IX. The court's only alternative was to place educational institutions in a Catch-22: If an institution downsized its athletic programs in a manner that reduced athletic opportunities for both male and female student-athletes, it would violate the Tenth Circuit's "statistical imbalance" theory of Title IX liability, even if, as here, male student-athletes bore a disproportionate share of the burden. If, however, the institution attempted to avoid such liability by intentionally singling out men's programs for budget cuts, it would violate the statute-based intentional discrimination theory of liability. It is difficult to imagine that Congress intended to place the nation's educational institutions -- and ultimately, the very student-athletes Title IX was designed to benefit -- in such a helpless situation.

determine whether the lower court decisions that mandate those changes are consistent with the language and purposes of Title IX. This case presents a perfect vehicle for resolving those important issues.

CONCLUSION

For the reasons stated herein, this Court should issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted this 4th day of October 1993.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 93-Z-1310

JENNIFER ROBERTS, JULIE OSBORNE, JANET BRUMBELOW, LAURA BIELAK, SARA STOUT, AMY RECOUPER, JENNIFER JACOBS, MALIA KUENZLI, STACIE STAFFORD, HEATHER NAKASONE, KIM JOHNSON, AIMEE RICE, AND LISA MIZE,

Plaintiffs,

vs.

COLORADO STATE UNIVERSITY, COLORADO STATE BOARD OF AGRICULTURE, in its capacity as the entity charged with the general control and supervision of Colorado State University,

Defendants.

OPINION AND ORDER

Weinshienk, District Judge

Procedural and Factual Background

Plaintiffs are former members of the Colorado State University (CSU) women's varsity softball team which was terminated on June

1, 1992. Plaintiffs seek reinstatement of the softball team and damages. A hearing on plaintiffs' Complaint For Injunctive Relief was held on July 17, 1992. At that time, the Court denied plaintiffs' Motion For Injunctive Relief due to plaintiffs' inability to demonstrate a substantial likelihood of success on the merits. *Lundgrin v. Claytor*, 619 F.2d 61 (10th Cir. 1980). At the conclusion of this hearing, the parties stipulated to a stay of the sale of the softball team's equipment, plaintiffs' continued receipt of their softball scholarships without work requirements for the 1992-1993 school year, and expedited discovery. A status conference was held on October 26, 1992, at which the parties agreed to bifurcate the violation and damages phases of the trial. The case is set for a two day trial to Court on the issue of damages on Thursday, March 25, 1993.

A trial to court concerning plaintiffs' request for a permanent injunction reinstating the women's intercollegiate softball program at CSU was held on November 19, 1992, continuing on November 20, 23, and 24, 1992. After careful consideration, the Court has made findings of fact and conclusions of law based upon the evidence presented during the trial and the pre-trial briefs submitted by the parties.

Regulatory Framework of Title IX

The central question in this case is whether defendants' termination of the women's softball team either caused a violation of Title IX or was the perpetuation of an already existing violation by defendants. This and other issues presented in the instant case necessitate a brief analysis of the regulatory framework of Title IX. Title IX, which is codified at 20 U.S.C. § 1681, became effective on July 1, 1972, and provides that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

Defendants concede that Colorado State University is an educational institution receiving federal financial assistance, and the Court determines that CSU's athletic department is subject to the provisions of Title IX.

The regulations interpreting the application of Title IX to athletic programs became effective on July 21, 1975. These regulations require that "a recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes." 34 CFR § 106.41(c). In determining whether equal opportunities are available, the Director of the Office of Civil Rights of the Department of Education (OCR) must consider, among other factors, "whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." 34 CFR § 106.41(c)(1).

A Policy Interpretation further developing the meaning of "equal opportunity" in intercollegiate athletics was issued in 1979. *See* Policy Interpretation, 44 Fed. Reg. 71413 (Dec. 11, 1979). The express purpose of the Title IX Policy Interpretation is to explain the factors and standards which the Department of Education will consider in determining whether an institution's intercollegiate athletics program complies with the law and governing regulations. 44 Fed. Reg. 71413. The policy interpretation is divided into three areas of inquiry: Athletic Financial Assistance (Scholarships), 34 CFR § 106.37(c); Equivalence in Other Athletic Benefits and Opportunities, 34 CFR § 106.41(c)(2)-(10); and Effective Accommodation of Student Interests And Abilities, 34 CFR § 106.41(c)(1). 44 Fed. Reg. at 71414.

In April of 1990, the OCR of the Department of Education issued the *Title IX Athletics Investigator's Manual* to assist OCR personnel in conducting athletic investigations. Defendants' Exhibit A. According to the Investigator's Manual, "the intercollegiate athletics Policy Interpretation requires that OCR use an overall

approach and review the total athletics program for intercollegiate athletics investigations." *Id.* at 7. However, the Investigator's Manual also reiterates the three major areas of investigation established in the Policy Interpretation and states that "an investigation may be limited to less than all three off these major areas where unique circumstances justify limiting a particular investigation to one or two of these major areas." *Id.*

Plaintiffs' allegations of discrimination under Title IX are narrowly stated under the third prong of the Policy Interpretation: Effective Accommodation of Student Interests And Abilities, 34 CFR § 106.41(c)(1). Although defendants argue that the language in the Investigator's Manual requires that plaintiffs demonstrate an overall violation of either 34 CFR § 106.37(c) or 34 CFR § 106.41(c)(1)-(10) in order to sustain a claim of discrimination under Title IX, the Court is satisfied that the regulations and Policy Interpretation allow for a showing of violation under 34 CFR § 106.41(c)(1) only. The decisions in *Favia v. Indiana University Of Pennsylvania*, No. 92-2045, slip op. (W.D. Pa. November 2, 1992), and *Cohen v. Brown University*, No. 92-197, slip op. (D.R.I. December 22, 1992), support this view. In *Favia*, female students sought reinstatement of two women's teams eliminated by the defendant university's budget reduction efforts. Although the *Favia* Court mentioned disparities in athletic scholarships in the opinion, the Court's ruling in favor of plaintiffs was based largely upon an analysis made under 34 CFR § 106.41(c)(1). *Favia*, slip op. at 15. Plaintiffs in the *Cohen* case challenged Brown University's demotion of two women's teams from varsity to club status. In granting plaintiffs' motion for a preliminary injunction, the *Cohen* Court specifically held that a finding of a Title IX violation may be limited solely to 34 CFR § 106.41(c)(1). *Cohen*, slip op. at 27.

Although minor inconsistencies do exist between the Policy Interpretation and the Investigator's Manual, an evaluation of CSU's entire athletic program is neither required nor necessary to the resolution of the issues presented in this case. After examining both

the regulatory framework of Title IX and the language in the *Favia* and *Cohen* cases, the Court is convinced that a violation of Title IX may be shown by proof of a substantial violation in any one of the three major areas of investigation set out in the Policy Interpretation. Thus, the Court's findings of fact and conclusions of law will be limited to 34 CFR § 106.41(c)(1), the prong regarding the effective accommodation of student interests and abilities.

The Policy Interpretation delineates three areas of inquiry which should be considered in assessing compliance with 34 CFR § 106.41(c)(1):

> 1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> 2. Where the members of one sex have been and are under-represented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
>
> 3. Where the members of one sex are under-represented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of that sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. at 71418. The Court will hereafter refer to these three prongs as the "Effective Accommodation" test. Plaintiffs have the burden of proving that intercollegiate level participation opportunities for male and female students are not provided in numbers substantially proportionate to their respective enrollments. *Favia*, slip

op. at 15. Defendants have the burden of proof as to the second and third prongs of the Effective Accommodation test. *Id.*; *See also, Cohen*, slip op. at 34.

Findings of Fact and Conclusions of Law

1. Substantial Proportionality

At trial, defendants argued that the Court should not rely on the statistics submitted by plaintiffs for the 1980-81 and 1981-82 school years in determining whether CSU is in compliance with 34 CFR § 106.41(c)(1). *See* Plaintiffs' Exhibit 64. All of the figures contained in Exhibit 64 were obtained from Ms. Roselyn Cutler, CSU's Title IX Coordinator, either during or after her deposition. Ms. Cutler testified at trial that the figures for the 1980-81 and 1981-82 school years were taken from the squad lists for that year. Although defendants stressed Ms. Cutler's testimony on redirect that she was unable to confirm the validity of the figures for the years in question, they failed to explain why the same allegedly unreliable figures were provided to the OCR in 1983 during the OCR's Title IX compliance review of CSU. Defendants also have failed to offer any figures which they believe to be more accurate than those before the Court. Finally, defendants did not articulate any cognizable difference between the manner in which the figures for the two years in question were compiled and that in which the figures for the other years were gathered. For these reasons, the Court rejects defendants' argument and will therefore consider as accurate the figures for the 1980-81 and 1981-82 school years indicated in Exhibit 64.

Beginning with the 1980-82 academic school year and ending with the current school year, the gaps between women's athletic participation rates and their undergraduate enrollment at CSU have been, respectively, 7.5%, 12.6%, 15.6%, 15%, 18.6%, 12.3%, 16.5%, 14.8%, 15.6%, 16.7%, 14.9%, 12.7%, and 10.6%. *See* Exhibit 64. During this twelve year period, the average disparity

between enrollment and athletic participation rates for women was 14.1%.

During the 1991-92 academic school year CSU funded a total of 17 varsity teams for male and female students. Defendants' Exhibit R. In 1991-92, women comprised 35.2% of the total athletes at CSU. At the same time, the enrollment of women at CSU was 47.9% of the total student population. Exhibit 64. Thus, the disparity between the percentage of women enrolled at CSU and the percentage of women participating in athletics at CSU prior to the June 1, 1992, termination of the women's softball team was 12.7%. In the current 1992-93 school year, women athletes now make up approximately 37.7% of total athletes participating in CSU's intercollegiate programs. The enrollment of women at CSU is currently 48.2% of the undergraduate student population. Therefore, the enrollment versus participation disparity rate for females at CSU after the termination of the women's softball team is 10.5%. *Id.*

CSU argues that its current female participation rate is substantially proportionate to the current female enrollment rate. Defendants' Pre-Trial Brief, p. 11. According to defendants, the regulatory framework of Title IX provides no guidance in determining substantial proportionality. In addition, defendants argue that the OCR has specifically rejected the setting of a particular figure against which compliance with 34 CFR § 106.41(c)(1) can be judged. *Id.* at 12. The language contained in the Investigator's Manual to which defendants are apparently referring reads that "there is no set ratio that constitutes 'substantially proportionate' or that, when not met, results in a disparity or a violation. All factors for this program component, and any justifications for differences offered by the institution, must be considered before a finding is made." Defendants' Exhibit A at 24. However, this section of the Investigator's Manual must be read in conjunction with other relevant language contained in the manual, with the October 14, 1983, Statement of Findings issued by the OCR after it completed a Title IX compliance review of CSU's athletic department, and with the *Cohen*

case.

In the paragraph immediately preceding the language upon which defendants' apparently rely, the Investigator's Manual directs OCR personnel investigating the substantial proportionality prong under 34 CFR § 106.41(c)(1) to first compare the number of male and female participants with the number of full-time undergraduate students. Exhibit A at 24. The manual then advises OCR investigators that "if the results are substantially proportionate (for example, if the enrollment is 52% male and 48% female, then, ideally, about 52% of the participants in the athletics program should be male and 48% female), the recipient is effectively accommodating the interests and abilities of both sexes." *Id.* The Court finds this language to be useful in determining the intended meaning of the term "substantially proportionate". The following language contained in the Investigator's Manual also is considered by the Court:

> OCR investigative experience indicates that where budget restrictions have led a recipient to eliminate sports previously offered, there is frequently a compliance problem with this program component. The tendency is for institutions to eliminate a sport previously offered to women who are already under-represented in the institution's athletics programs. The result has been that women are now more disadvantaged by the elimination of a women's team despite sufficient interest and ability to sustain a viable team. In this situation, the institution may well be in violation of this program component.

Id. at 27.

The Statement of Findings issued by the OCR after completing a Title IX compliance review at CSU in 1983 provides the Court with further guidance as to what numerical disparity between female participation rates and enrollment should be considered to be "substantial." In its Statement of Findings, the OCR refers to a table

listing sports and the number of participants for three academic years, 1980-81 through 1982-83. Plaintiffs' Exhibit 2 at 77. Noting a difference between the percent of women enrolled and women's athletic participation of 7.5%, 12.5%, and 12.7%, respectively, for the three academic years being reviewed, the OCR concluded that "the intercollegiate level participation opportunities for male and female students are not substantially proportionate to their respective enrollments." *Id.* The OCR also noted that women's field hockey was to be dropped following the 1983-84 academic year, stating that "as a consequence of this action, the disparity between women's participation opportunities not being substantially proportionate to their enrollment will be exacerbated." *Id.*

Finally, the recent decision in the *Cohen* case offers the Court additional guidance on the meaning of the term substantially proportionate. In *Cohen*, the disparity between the defendant university's female athletes and their respective enrollments after the demotion of four varsity teams was found to be 11.6%. *Cohen* at 31. Based on this disparity, the *Cohen* Court held that plaintiffs had successfully demonstrated that the ratio of female varsity athletes to their respective enrollments was not "substantially proportionate." *Id.*

After reviewing the statistical evidence submitted at trial and the sources of guidance cited in the preceding paragraphs, the Court determines that the current rate of female participation in athletics at CSU is not substantially proportionate to female undergraduate enrollment. More specifically, the Court finds that a disparity between female athletic participation and female undergraduate enrollment of 10.6% is not acceptable under Title IX absent a showing by defendants under the second or third prong of the Effective Accommodation test.

In addition, the Court finds that for at least the last decade, female participation rates at CSU have not been substantially proportionate to CSU's female undergraduate enrollment. The affidavit of Dr. Mary Gray, a professor of mathematics and statistics

at American University, was introduced at trial. Plaintiffs' Exhibit 54. In this affidavit, Dr. Gray testified credibly and persuasively that the difference between the proportion of women as undergraduates and their participation rate in athletics at CSU is highly statistically significant, and represents a persistent pattern over the last ten years. The Court agrees with Dr. Gray's conclusion that the disparities between women's enrollment and athletic participation rates at CSU over the last decade could not have occurred merely by chance.

On a final note, defendants argued strenuously in their brief and at trial that a finding by this Court that CSU's female enrollment versus participation statistics are not substantially proportionate will necessarily implicate the athletic departments of virtually every institution of higher education in this country. Plaintiffs, however, have alleged a violation of Title IX solely against CSU. In addition, if defendants are found by this Court to be in violation of Title IX, the fact that CSU's participation statistics are better than those of other schools is of no legal consequence. Accordingly, this Court has not considered how CSU's participation rates compare with those of other undergraduate institutions. The issue of whether other universities are complying with Title IX is for other courts to decide based upon individualized allegations and independent findings of fact.

2. History of Program Expansion

It has been demonstrated that female enrollment is not substantially proportionate to female athletic participation at CSU. Therefore, the Court must now consider the second prong of the Effective Accommodation test. This prong is particularly difficult to determine given the fact that the absolute number of opportunities to compete in intercollegiate athletics at CSU has decreased for both women and men in the last decade. Unfortunately, CSU has been no exception to the economic reality of more restrictive budgets which most of our nation's educational institutions are facing. However, because women were in the past and continue to be under-represented

in CSU athletics, CSU must demonstrate to the Court's satisfaction a history and continuing practice of program expansion for women.

While admitting that prior to 1970, CSU did not offer a single sport for women, defendants point to the addition of eleven sports for women during the 1970's as evidence of athletic program expansion for women at CSU. Defendants' Pre-Trial Brief at 14. Although the Court agrees that the eight women's teams currently offered by CSU are an improvement over the non-existent state of women's teams prior to 1970, the Court cannot accept defendants' conclusion that the mere fact that CSU now offers women's teams is evidence of program expansion for women. This Court's acceptance of such an argument would render meaningless Title IX's regulations and its Policy Interpretation. Acceptance of this argument also would implicitly condone the attitude that female athletes at CSU should be satisfied with their current opportunities given the pre-1970 lack of participation opportunities for women in intercollegiate athletics. The regulations which implemented Title IX were promulgated for the very purpose of rectifying historical inequities between men's and women's intercollegiate athletic programs. Indeed, the program expansion prong of the Effective Accommodation test was not intended to stop the compliance inquiry as to any institution that can demonstrate that it has added a women's sports team sometime in the last three decades. In this regard, the Court rejects as insufficient defendants' assertion that they have demonstrated program expansion because women's team were added at CSU during the 1970's.

CSU further contends that its decision to cut baseball and softball must be regarded as a positive proportional development for women under Title IX because the termination of women's softball, with its 18 participants, and men's baseball, with its 55 participants, actually caused the women's participation rate at CSU to rise. Defendants' Pre-Trial Brief at 6. While it is true that the disparity between women's enrollment and athletic participation is less now than it was prior to the termination of softball, defendants' assertion fails to take into consideration the facts that the actual number of

athletic participation opportunities for women at CSU have steadily declined over the past twelve years and that no new varsity teams for women have been added during that time. The Court determines that CSU cannot show program expansion for women solely by pointing to increases in the percentage of women athletes caused by reducing the number of men athletes. CSU must either demonstrate actual expansion in women's athletic programming or establish that it has considered and improved upon the under-represented status of women athletes when reductions in athletic programs became necessary in the past.

After considering the dynamics of program contraction at CSU over the last twelve years, the Court is convinced that CSU did not seriously consider nor improve the representation of female athletes when budget cuts became necessary. For example, four women's varsity teams have been dropped since the 1980-81 school year; gymnastics in 1980, field hockey in 1984, junior varsity volleyball in 1987, and softball in 1992. During the same time period, and despite the under-representation of women athletes, the men lost only three varsity teams; gymnastics in 1980, wrestling in 1986, and baseball in 1992.

Since 1980-81, the total number of participation opportunities for women athletes have decreased from 183 opportunities to 120 in 1992-93. During the 1980-81 school year, male athletes at CSU maintained 246 participation opportunities. This number has decreased to 198 male participation opportunities in 1992-93. *See* Exhibit 64. Thus, it is undeniable that in the last twelve years women's participation opportunities have declined by approximately 34 percent or 63 participation opportunities while men's participation opportunities have declined by approximately 20 percent or 48 participation opportunities. The Court finds that in the last twelve years, women have been disproportionately impacted by the general reduction in athletic participation opportunities at CSU. In accordance with this finding, the Court concludes that CSU has failed to demonstrate program expansion in the area of providing athletic

participation opportunities for women.

The Court determines that the relevant period of inquiry as to CSU's other program expansion efforts is the era in which CSU was put on notice that female athletes' participation rates were not substantially proportionate to female undergraduate enrollment. In 1983, the OCR for the Department of Education conducted a Title IX Compliance review of CSU's athletic department. In the cover letter attached to the OCR's Statement of Findings, the former Regional Director of the OCR, Dr. Gilbert D. Roman, indicated that "benefits, opportunities, and treatment are not equivalent in the areas of equipment and supplies, locker rooms, coaching, recruitment, publicity, support services and the effective accommodation of student interests and abilities. OCR concluded that collectively these disparities violate Title IX." Plaintiffs' Exhibit 2 at 3 - 4. Dr. Roman went on to state, however, that "based upon your written assurance that the remedial actions set forth in your submitted plan are being implemented, we consider Colorado State University to be presently fulfilling its obligations under 34 CFR § 106.41(c) ... continued compliance is contingent upon carrying out the provisions of the plan." *Id.*

The corrective action plan to which Dr. Roman referred in his letter was submitted to the OCR in September of 1983. *See* Plaintiffs' Exhibit 6. In this plan, CSU committed to raising the participation rate of women to 46.5% by the 1987-88 school year. CSU also agreed to develop junior varsity teams for the women's volleyball and basketball teams. In addition, CSU pledged itself to small increases in participation on several of the women's teams. The evidence received at trial demonstrated that CSU did not meet its 1987-88 participation goal of 46.5 percent. In fact, the evidence shows that the athletic participation rate of females at CSU during the 1987-88 school year was 33.8 percent. *See* Exhibit 64. The evidence also indicates that CSU added a women's junior varsity volleyball team in 1984, but dropped the team in 1987.

In May of 1985, defendants submitted to the OCR a progress report concerning the implementation of their 1983 Title IX corrective action plan. *See* Plaintiffs' Exhibit 15. In this progress report, defendants' represented to the OCR that "the Corrective action plan states 'In 1987-88, 46.5% of the participants will be women and 53.3% will be men.' In pursuit of that goal, and precisely as planned for 1984-85, the 1984-85 participation rates were 42.9% for women and 57.1% for men." *Id.* at 3. However, Ms. Cutler testified at trial that the female participation percentage stated in the letter was incorrect. From the figures produced by Ms. Cutler at her deposition, it appears that the actual female participation rate for women during the 1984-85 school year was 30.7%. *See* Exhibit 64. In their progress report, defendants also reported to the OCR that due to the elimination of men's varsity wrestling, it was no longer necessary to add a women's junior varsity basketball team in order to achieve the participation figures outlined in the 1983 corrective action plan. Exhibit 15 at 4.

On February 10, 1989, defendants submitted another status report to the OCR regarding CSU's 1983 corrective action plan. Plaintiffs' Exhibit 14. In this status report, defendants admitted that they had not achieved the participation goal for women delineated in their 1983 corrective action plan and attempted to explain their failure. *Id.* at 6. The two reasons cited by defendants as leading them to believe that the participation goal of 46.5% for women was unattainable were that other institutions with which CSU participated regularly had lower participation rates and that statistics generated by the Colorado Department of Education indicated that females made up only 40% of all Colorado high school athletes. *Id.* Defendants also stated that they would put forth their best efforts to maintain or diminish the ratio between CSU's female participation rate and that of Colorado's female high school athletes. Finally, defendants indicated that subsequent to the termination of men's baseball in 1989-90, they planned to modify the on campus baseball field for use as a women's softball facility. *Id.* at 4.

In a letter dated March 8, 1989, Dr. Roman responded to defendants' February 10, 1989, progress report. Defendants' Exhibit BL. In this letter, Dr. Roman determined that CSU had provided "valid, nondiscriminatory reasons" for not meeting the participation goals articulated in defendants' 1983 corrective action plan. *Id* at 2. Dr. Roman also indicated that the monitoring procedures of CSU's athletic department were terminated given CSU's "good faith efforts to increase athletic opportunities for female student athletes." *Id*. With all due respect to Dr. Roman's conclusions, this Court determines that the excuse offered by CSU that other institutions had worse participation rates for female athletes than did CSU is not a valid nondiscriminatory reason for maintaining female participation rates which are substantially disproportionate to female undergraduate enrollment. With regard to defendants' justification that Colorado high school female athletes participate at a rate of 40%, the Court notes that defendants have not matched this lesser and presumably attainable goal of 40% female participation since the 1980-81 school year. *See* Exhibit 14 at 6; *see also*, Exhibit 64. Moreover, the Court finds that CSU's participation figure for females at the time the OCR terminated its monitoring procedures in 1989 were actually lower than they were before the OCR's Title IX compliance review began in 1983. *See* Exhibit 64. The Court concludes that lower participation rates and decreasing participation opportunities for women are not indicators of a good faith effort on behalf of defendants to increase athletic opportunities for female student athletes at Colorado State University.

On November 20, 1991, the CSU athletic department issued a Strategic Plan for Fiscal Years 1992-93 - 1996-97 which identified five programs of emphasis. Plaintiffs' Exhibit 18. The five programs designated for emphasis include football, men's basketball, academic support services, athletic development, and marketing/promotion activities. *Id*. at 6. Although three of the programs to be emphasized presumably will impact female athletes, the only specific mention of future plans to benefit women athletes comes at the end of defendants' enumeration of the five programs of

emphasis. Defendants state that "it's imperative that over the planning period, the Department upgrade the non-revenue sports scholarship base. Volleyball, women's basketball, and swimming will be funded and the balance of women's sports will be funded based on residency dollars." *Id.* at 8. Based upon the above evidence, it appears that defendants do not have any concrete plans to substantially expand its current programs for female athletes in the near future. Indeed, defendants stated in pre-trial interrogatories that CSU does not presently plan to add teams to its intercollegiate athletics program. Plaintiffs' Exhibit 21 at 10.

In summation, the Court notes that none of the major goals articulated in defendants' 1983 corrective action were ever attained. The Court also finds that over the last twelve years women have shouldered a disproportionate amount of the program contraction efforts at CSU. After a careful review of the statistics for the past twelve years and defendants' unattained program expansion goals for CSU, the Court concludes that CSU has not demonstrated a history and continuing practice of program expansion for women.

3. Full and effective Accommodation Of Interests and Abilities

While it has already been determined that women are under-represented among CSU's intercollegiate athletes, and that defendants cannot show a continuing practice of program expansion, defendants can still prevail in this lawsuit if they can demonstrate that the interests and abilities of women are being fully and effectively accommodated by CSU's present athletic program.

At trial, Jennifer Roberts and Aimee Rice Ainsworth testified persuasively about their dedication to the sport of softball, the amount of time they had invested throughout their lives in training for this sport, and tangible losses they are experiencing in not being able to play softball during the current academic year. This testimony was consistent with the testimony of Laura Bielak and Malia Kuenzli at the preliminary injunction hearing and with the affidavits submitted

by the remaining plaintiffs. The testimony of Ms. Roberts and Ms. Rice Ainsworth indicated that CSU's women's softball team finished third in the Western Athletic Conference in 1992. In addition, plaintiff Stacie Stafford was named a Western Athletic Conference Softball Player of the Week in 1992. Ms Roberts and Ms. Rice Ainsworth further testified that CSU freshwomen definitely are interested in fast-pitch softball, and have turned out in considerable numbers to participate in a softball club team. From the testimony presented at trial and the other evidence considered by this Court, it appears that CSU has eliminated varsity athletic opportunities for women in a sport where there is significant interest and talent.

It also appears to the Court that the popularity of women's softball at CSU is a reflection of the sport's growing popularity nationwide. According to Charles W. Rice, the Colorado Commissioner for the Colorado Amateur Softball Association, fast pitch softball is becoming an increasingly popular sport for girls in Colorado. *See* Plaintiffs' Exhibit 52. Figures provided by Mr. Rice indicate that high school competition in fast-pitch softball has increased from approximately 1,950 girls in 1980 to approximately 4,605 girls in 1992, an increase in participation of approximately 236 percent. *Id.* This increase in participation in Colorado is significant because Colorado high schools provide CSU with approximately 75% of its undergraduate student population. Defendants' Pre-Trial Brief at 17. In his affidavit, Mr. Rice also reports that 100% of female high school seniors participating in the Colorado All-Star Girls Fast-Pitch Softball League in the last four years have gone on to college. Finally, Mr. Rice points out that women's fast-pitch softball will be a medal sport in the 1996 Summer Olympics.

The evidence provided by Mr. Rice, Ms. Roberts, Ms. Rice Ainsworth, and the other plaintiffs convinces the Court that a substantial number of current and future CSU female students are now or will be interested in the future in competing on women's varsity, club, and intramural softball teams. Accordingly, the Court finds that there is a strong present and future interest in retaining

women's fast-pitch softball as a varsity sport at CSU. Considering the existing disparity between female and male varsity athletes and their respective enrollments, and the demonstrable interest in the variety opportunities being eliminated, the Court concludes that the termination of these opportunities evidences a failure to accommodate the interests and abilities of women. However, the Court's inquiry as to whether the interests and abilities of women have been fully and effectively accommodated by CSU's athletic program goes beyond the demonstrated interest in women's softball. Are there other women students at CSU whose interests in additional athletic participation opportunities have not been fully and effectively accommodated?

In determining whether CSU is fully and effectively accommodating the interests and abilities of its athletes, the Court may consider the expressed interests of female students, whether there are sufficient numbers of athletes to form a team, and whether there is a reasonable expectation of intercollegiate competition for that team. *Cohen*, slip op. at 34. The testimony of Mr. William Hall, CSU's Club Sports Coordinator, was illuminating with regard to these factors. Mr. Hall testified that he considered the women's soccer, women's lacrosse, women's rugby, women's volleyball, and women's alpine ski club teams to be competitive. According to Mr. Hall, the women's soccer team has expressed its interest in becoming a varsity sport. He added that the women's soccer club has played a competitive intercollegiate game schedule in past seasons. Defendants agree that women's soccer has a popularity level equal to or exceeding the women's fast-pitch softball club. Defendants' Pre-Trial Brief at 20. Further, defendants imply in their brief that were resources not limited, there would be adequate numbers of interested women students at CSU to enable defendants to add varsity teams in women's lacrosse, women's soccer, women's junior varsity volleyball, and women's alpine skiing. *Id.* Further, Mr. Hall's testimony made clear the difference in benefits afforded to club sport participants and to varsity athletes. For example, Mr. Hall testified that CSU sponsors approximately 32 club sports teams with a total budget of approximately $70,000 dollars. This sum is less than half

the amount allocated to the women's varsity softball team for the 1991-92 school year. *See* Plaintiffs' Exhibit 20. In addition, and unlike varsity athletes, club sports participants must pay dues, buy their own equipment, pay their own travel costs, and are not eligible for athletic scholarships.

The Court determines from the testimony of Mr. Hall and the defendants' own arguments that there are women athletes at CSU who are interested in and capable of playing on varsity teams other than those currently offered by CSU. Had CSU been searching for ways to expand varsity participation opportunities for women rather than reduce them, they would have had to look no further than CSU's club sports program. If, for example, CSU had added a 23 woman varsity soccer team during the 1992-93 school year to meet the demonstrated interest of female athletes, and had at the same time maintained its women's softball team, the female participation rate at CSU would have risen to approximately 44.3%. If, hypothetically, defendants had also added a women's varsity alpine ski racing team with 15 members, female participation would have risen to 46.6%, leaving an acceptable 1.7% gap between female athletic participation and female undergraduate enrollment. *Id.* In determining the average participation figures for these two teams, the Court considered the *NCAA Gender-Equity Study* which was released in March of 1992. *See* Defendants' Exhibit BH at 9. Finally, the Court notes that there would be a reasonable expectation of intercollegiate competition for varsity teams such as women's soccer or alpine skiing given the fact that several schools within the Western Athletic Conference offer women's soccer and alpine ski teams.

The Court concludes that defendants have not met their burden of proving that they are fully and effectively accommodating the interests of women at CSU despite the under-representation of women in CSU athletics. The evidence introduced at trial shows that there are in fact women at CSU who are capable and desirous of competing in varsity sports other than those being currently offered. Plaintiffs' testimony at trial also demonstrated that there is a strong present and

future interest in maintaining women's softball as a varsity sport at CSU. Thus, the Court finds that the demonstrated interests and abilities of both of these groups of female athletes are not being fully and effectively accommodated.

4. Other Findings

Mr. Corey Johnson and Ms. Roselyn Cutler testified at trial that the primary reason the women's softball team was eliminated was to reduce a budget shortfall in CSU's athletic department. However, a financial crisis cannot justify gender discrimination. *See Cook v. Colgate Univ.*, No. 90-411, slip op. (N.D.N.Y September 28, 1992); *Favia*, slip op. at 11. Dr. Albert Yates, Mr. Johnson, and Ms. Cutler also testified that they did not intend to violate Title IX nor did they believe they were violating Title IX by their decision to cut the women's softball team. Although the Court finds that these three individuals discussed and considered Title IX before cutting the women's softball team, Title IX and the implementing regulations can be violated without a showing of specific intent to discriminate against women on the part of the decision makers for the educational institution. *See Haffer v. Temple University*, 678 F. Supp. 517, 540 (E.D.Pa. 1987); *Favia*, slip op at 11. In other words, good intentions or a misinterpretation of the law does not negate a violation of Title IX.

Conclusion

The Court concludes that defendants' decision to terminate the women's softball team constitutes a violation of Title IX, when viewed in the context of CSU's disproportionate athletic participation rates for women, defendants' failure to demonstrate a history of program expansion for women, and defendants' failure to demonstrate effective accommodation of female students' interests and abilities. The underlying mandate of this opinion is that CSU may not continue to operate an intercollegiate athletic program that provides a

disproportionate amount of participation opportunities to male athletes where there is no evidence of continuing program expansion or effective accommodation of the interests and abilities of its female students. Accordingly, a permanent injunction will issue in favor of plaintiffs and against defendants requiring defendants to reinstate the women's intercollegiate softball program and to provide the women's softball team with all of the incidental benefits accorded other varsity teams at CSU. It is thereby

ORDERED that a permanent injunction against defendants requiring them to reinstate the CSU women's softball team is hereby issued. It is

FURTHER ORDERED that the parties are to submit a status report on or before April 16, 1993.

DATED at Denver, Colorado, this ____ day of February, 1993.

BY THE COURT:

_____

ZITA L. WEINSHIENK, Judge
United States District Court

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92-Z-1310

JENNIFER ROBERTS, et al.,

Plaintiffs,

vs.

COLORADO STATE UNIVERSITY, et al.,

Defendants.

REPORTER'S TRANSCRIPT
(Status Conference)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 1:25 p.m., on the 11th day of March, 1993, in Courtroom C-502, United States Courthouse, Denver, Colorado.

APPEARANCES

PAMELA A. GAGEL and, KAREN E. ROBERTSON, Attorneys at Law, Kobayashi & Associates, 1700 Broadway, Suite 1900, Denver, Colorado, 80290, appearing for the plaintiffs.

WILLIAM E. THRO and MARGARET WALTON, Assistant Colorado Attorneys General, 1525 Sherman Street, 5th Floor, Denver, Colorado, 80203, appearing for the defendants.

Proceedings Recorded by Mechanical Stenography, Transcription Produced via Computer by Paul Zuckerman, 1929 Stout Street, P.O. Box 3563, Denver, Colorado 80294, (303) 629-9285.

PROCEEDINGS

THE COURTROOM DEPUTY: The matter now before the Court is Jennifer Roberts, et al., vs. Colorado State University, et al., Civil Action No. 92-Z-1310.

THE COURT: Appearances for the plaintiffs.

MS. GAGEL: Good afternoon, your Honor. Pamela Gagel and Karen Robertson from Kobayashi & Associates.

THE COURT: All right. Mr. Thro?

MR. THRO: Assistant Attorney General William Thro.

MS. WALTON: And Margaret Walton, your Honor.

THE COURT: Thank you.

I intended to just do this informally as a status conference in the jury room; but since we had so many people, I decided that there really isn't enough room in there for everybody; so we're having an informal status conference, but we're doing it here in the courtroom.

Let me just indicate to the parties that first of all, I am in trial and we're going to have to be very expeditious in trying to resolve the problems that have arisen in this case.

I then want to say to the defendants that it has been many years since I've had a party attempt to what appears to the Court -- to be to stonewall a court order the way that this has been done in this case.

And I'm not that happy with the plaintiffs, either, because I really didn't hear about it when I should have through the plaintiffs with a motion. I get information through the media, an article in the news which says that Ms. Cutler and CSU will take no steps towards reinstating women's softball until the appellate court rules on the school's request for stay of Weinshienk's order pending resolution of the full appeal.

And now I've been presented with an affidavit that someone named Kelly Miller in Mr. Johnson's office has told a mother who has a daughter who is interested in softball that the court order doesn't necessarily mean anything, the court order didn't necessarily mean the team would ever be reinstated.

In this country of laws, we follow court orders unless and until they're reversed on appeal; and that applies to CSU and it applies to the Attorney General's office.

So the reason for this conference is to see what can be done to immediately -- immediately put into effect the Court's order, which should have been done at the time of the Court's order and not stalled until today; and if we can't do something immediately, then the Court proposes to order some very specific orders giving CSU to get insurance, X number of days to hire a coach, to see if we can -- if there can be a softball season for this spring, if there is any possibility; and if there is no possibility, then for sure for the fall of '93 to get ready for the '94 season. And there has been quite a bit of material that there could be a fall season, which would mean that young women must be recruited, activities must be begun, the field must be -- if the men's basket -- men's baseball field is going to be used, as was stated to the OCR many years ago, if it's going to be

fixed over and used, that should be done.

But I don't intend to just sit and let people twiddle their thumbs in this case, and I don't intend to have the defendants do what they appear peer to be doing, which is thumbing their nose at the court order.

Mr. Thro, what can we do to get something going this spring?

MR. THRO: First, your Honor, I'd like to address some of the points that your Honor has raised.

Ms. Cutler was characterized in the Rocky Mountain News a couple of week ago as saying that CSU would not do anything until the Tenth Circuit ruled. That was a mischaracterization of what Ms. Cutler said. The plaintiffs have been informed repeatedly that this was a mischaracterization of what she said. It has never been our intention to do that.

We fully --

THE COURT: I'm happy to hear that.

MR. THRO: We fully realize that your court order, which was entered on the 18th of February, became effective on that date. Since that date, while attempting to get a stay in the Tenth Circuit unsuccessfully, we have endeavored to comply with your order to reinstate the softball program.

As we stated in our status report, the first status report, Mr. Johnson has done a great deal of investigation as to the feasibility of having a season in 1993, the spring of 1993. He contacted every Division I-A conference west of the Mississippi River and basically was told that there were no openings.

We've looked into the matter of liability insurance. We have

begun the process of hiring a coach. We are making a good faith, solid effort to comply with the Court's order. We intend to have a season in the spring of 1994, but, your Honor --

THE COURT: No, there is going to be a season in the fall of 1993, Mr. Thro.

MR. THRO: Okay. If that's what your Honor orders, then we will --

THE COURT: That's what I will order.

MR. THRO: Then we will comply with that and have a season in the -- have an exhibition season in the fall of 1993.

THE COURT: I don't see how you can be prepared to have a '94 spring competitive season, if you don't start immediately.

MR. THRO: Your Honor, we are starting immediately. We have notified the other conferences that we will be having a team. We have begun the process of hiring a coach.

THE COURT: When do you think you'll have a coach?

MR. THRO: As we said in our second status report, which was submitted to you yesterday, your Honor, we hopefully will be able to name a coach on or about June 1 of 1993.

THE COURT: Well, I had a really good idea driving home last night. It seems to me that I heard in the testimony -- you're going to have to refresh my memory -- that the baseball coach was doing fund-raising. He wasn't actually fired. He's still a CSU employee.

What about the baseball coach being acting coach between today and June 1, until you get your new coach on board?

Is that a possibility?

MR. THRO: In all honesty, your Honor, I am unsure. I could find out and we could report back to you, say, tomorrow on that.

THE COURT: Okay. If that's not a possibility --

MR. THRO: The baseball coach -- the former baseball coach is still an employee of CSU. I do know that.

THE COURT: And he'd probably like the idea of coaching a team, even if it would be a women's team.

MR. THRO: I wouldn't speculate on what he would think.

THE COURT: If he can't do it, then there should be at least some acting coach who shall fill in until you get your coach on June 1. But I think there needs to be something done right away.

Perhaps one of the senior girls can work with someone and be helpful as a coach, if there is one of the young women who is interested in a coaching career. I think there is two seniors that are going to finish in December.

MR. THRO: I believe that's correct.

THE COURT: Perhaps one of them would be interested in working with the former baseball coach or with someone else to do some coaching. But the point is there has to be something done before June 1.

MR. THRO: With respect to the coach --

THE COURT: What about the insurance? When will that be in effect?

MR. THRO: We have contacted our insurance agent. We have been told that insurance will cost approximately $51.11 per athlete for -- if we got it in effect reasonably immediately until the end of this academic year, basically until the 1st of May, the way CSU's schedule is. We just found out that information, I believe, last night or early this morning. So --

MS. ROBERTSON: What's the amount?

MR. THRO: I believe I was told 51.11. It's 51-something.

THE COURT: Now, without some recruiting, there is not going to be enough women for the 1994 competitive team. What are your plans on that?

MR. THRO: Well, your Honor, our plans on that are twofold: First, as you know, there is a softball club of about 30 members at CSU. We had testimony from some of the plaintiffs that many of the members were capable, at least in their judgment, of playing NCAA Division I softball. At the same time as we related in our status -- second status report, Mr. Johnson has contacted the High School Activities Association and has obtained a list of every high school that sponsors source softball in the State of Colorado.

We also attached a draft letter to that second status report. Mr. Johnson intends to send that letter out in the very near future, and that would identify some prospects or perhaps encourage a young woman who wanted to play softball but was debating between, say, Colorado or Colorado State to go to Colorado State.

THE COURT: Well, pending that recruiting, then, you're going to have walk-on's from the softball club try out for the team.

MR. THRO: Right, as well as the plaintiffs. And the remaining plaintiffs still form a solid core nucleus of a team. I'm assuming, of course that it is correct the plaintiffs would wish to play.

MS. GAGEL: They do, your Honor.

THE COURT: All right. Apparently with this -- I trust you've seen this affidavit that just came in. It was filed today, affidavit of Terri Cayou. I read form one paragraph of it, but apparently there is a high school student who is very interested in softball.

I'm sure there is lots more like her.

MR. THRO: I am sure that there are as well, your Honor. Under NCAA rules, we cannot recruit a high school junior until the last day of that young woman's junior year. So Ms. Cayou -- and I believe her first name is Amy -- we could not contact her until school gets out in late May or June.

Obviously, if CSU's new coach believes that she has the talent to play for us -- I mean that is obviously some prospect that we have for 1994-95.

With respect to the affidavit of Ms. Cayou's mother, Ms. Miller, who spoke with her, is a secretary to Mr. Johnson. Mr. Johnson was not in when she called.

Ms. Miller does not speak for the university. She's not a representative of the university. And I have not spoken with Ms. Miller, but I would imagine that the gist of the conversation was that Ms. Miller was telling her, you know, that we are appealing this and there is a possibility that there will not be a team, if your Honor's order is reversed on appeal.

I do not think Ms. Miller meant to convey by any stretch of the imagination that we were not going to do anything pending appeal. Indeed, I think the documentation attached to both of our status reports indicates that CSU has been doing a great deal in terms of ascertaining if the 1993 season is possible and also beginning

preparations for 1994, such as beginning the process of hiring a coach, looking into liability insurance, seeing what the Division I regulations are, checking the academic eligibility of the plaintiffs and other people who have expressed an interest in the softball team, etc.

Also, I'm reminded that with respect to our liability insurance, a CSU employee must be supervising the students in order for the insurance to be in effect, so --

THE COURT: That's why I thought it was really a pretty interesting idea that came to me to get your baseball coach out there.

MR. THRO: Well --

THE COURT: I forget his name. Maybe you could remind me.

MR. THRO: I believe his name is Mr. Mason.

THE COURT: I know there is differences, but not that many differences; and he might thoroughly enjoy it.

I noticed one of the applicants -- and plaintiffs' gave me -- or maybe you gave me letters from various applicants for coaching jobs -- one or more are men. So as with many women's teams, there may be male coaches.

MR. THRO: Yes, and I believe a substantial number of the women's fast pitch softball coaches are men. A large percentage.

THE COURT: Oh, really?

MR. THRO: I'm not sure exactly what. And we have received to date, as of this morning, nine letters of inquiry.

THE COURT: Okay. So the insurance you're going to get rolling.

MR. THRO: Right.

THE COURT: And if the Tenth Circuit reverses me -- and I am personally very doubtful they will in view of how the law seems to be going across the country -- but should they, then you can cancel the insurance. You can make sure you get the type of insurance that is cancelable.

But meanwhile, we're going to assume that this order is affirmed, not that it's going to be reversed; and we're going to proceed as though it is affirmed and we're going to proceed in such a way that we will have a competitive team in '94 and have a season in the fall of '93.

If you don't have the fall of '93 season, I don't see how you're going to have a competitive team in '94; and that's why I want some of these commitments from you.

If you're going to do this, fine. If you, CU (sic), is going to do this, fine, because I don't particularly want to set deadlines and make orders, if I don't have to; but I won't hesitate to do it if I have to.

MR. THRO: I assume your Honor is ordering us to have a fall of 1993 season.

THE COURT: Yes, I am ordering that you have a fall of 1993 season; and I'm ordering that you get a softball coach with all due speed. And I'm asking you to please ask the -- and see if you can arrange for just as an interim matter whether the baseball coach might be willing to fill in so that things can get started right away with practices and recruitment, not only of walk-on's from the softball club but also talented freshmen for next year.

Now, what are you going to do about scholarships? What's in place there?

MR. THRO: With respect to scholarships, your Honor, the core of the plaintiffs that remain at CSU -- most are on scholarships. we would propose continuing those individuals who have not already completed four years of scholarship assistance -- we would continue them at approximately the same level they are now. In other words, if a young woman is getting tuition and books, next year she would get tuition and books, subject, of course, to the university's normal academic regulations. Obviously, we're not going to give scholarships to people who are academically ineligible.

THE COURT: I understand that. But the point is you have something like nine players, and you're going to need how many to field a team? 15 or so?

MR. THRO: I believe the NCAA Division I average is around 16. Technically, you could have 9 on the field at any time, I guess, if you wanted to play shorthanded. If you had an injury, you could go with 9. I quite honestly am not sure what a practical minimum is for a team. I know the NCAA average is 16. Presumably a few are up around 20 and perhaps some are down around 12 or 13.

THE COURT: Well, whoever is going to be in charge of coaching is going to have to try to decide fairly quickly how many of the walk-ons really are going to be eligible to make the varsity team and therefore how many scholarships will have to be available for incoming other students.

I don't know if they're all going to be freshmen. Freshmen, sophomore, whoever might be willing to come on.

What plans do have you in place for getting that started? In other words, there needs to be recruitment; and to recruit, you're either going to have to use Mr. Mason or someone experienced, or the new coach, who you don't think you can get on till June 1.

MR. THRO: Right. Presumably after June 1, the new coach

will be recruiting.

As far as recruiting between now and June 1, as we said in our second status report we would propose that those letters go out. Certainly with the Tenth Circuit's decision to deny a stay, our recruiting posture is improved somewhat; but we still are in a situation where we cannot really commit to someone that for four years there will be a softball team at CSU. Certainly there will be one in the fall of '93 and one in the spring of '94. Beyond that is largely up to the appellate courts. And we feel that given the situation, it really is not practical both in terms of recruiting, nor in the interest of the young women or the university, for us to offer scholarships to -- to potential freshmen as a way of inducing them to come to CSU.

THE COURT: I don't know how this works. In view of the peculiar circumstances, can you offer a one-year scholarship, or not?

MR. THRO: Generally, scholarships are offered under NCAA rules to one year, or I think in some cases, one semester. But the -- and this was the case with the plaintiffs. As your Honor knows, however, the plaintiffs have consistently said that, you know, they were offered something for four years, even though we dispute that.

And I would think that if a young woman was given the choice of a scholarship at CSU with a possibility that she might be there for four years, there might be a team, vs. a scholarship at, say, the University of Nebraska, where there is a greater guaranty there would be a team for four years, she would be more likely to take the one at the University of Nebraska.

In short, I'm not sure how competitive we are going to be in the recruiting game until this lawsuit is finally resolved.

Also, as you Honor noted in her order, there is great interest and ability on the CSU campus in softball. Based on the affidavit that

we have, Ms. Cayou -- it appears that we can get Amy Cayou very, very easily. She's willing to come tomorrow. Assuming she has the talent to play Division I, I'm not -- and being the only Division I program in the State of Colorado, I'm not sure that it is prudent for us to offer scholarships.

THE COURT: Anything else you want to state on the record?

MR. THRO: Yes. We really need some clarification with regard to the fall season. The last time that we actually played a fall season, which was 1990, we played in a grand total of three tournaments, which I believe were four teams each, so a total of about six or seven games.

It's my understanding form speaking with Mr. Johnson, there is an NCAA maximum on the number of contests you can play. I think that maximum is like 55 or 56. Every contest that you play in the fall is one less that you can play in the spring; so if we play 20 games in the spring or 20 games in the fall, that would limit us to 35 or 36 in the spring. And, you know, you stated that you are ordering us to have a meaningful fall season; and I was wondering exactly how your Honor would define that so that we may be properly guided.

THE COURT: Well, I'm certainly not an expert. And I realize you're not, Mr. Thro; but from the -- let's see. The affidavits that we've had -- trying to think which one it is. Ms. Allison.

MS. GAGEL: Ms. Allison's supplemental affidavit, your Honor, sets forth several tournaments, and CSU has participated in a fall season before. The plaintiffs are conscious that they're just looking at participating in some tournaments and --

THE COURT: I think both you and I are going to --

MS. GAGEL: We'll have to see how many games they've played in before.

THE COURT: All of us are going to have to rely on the experts in this area.

MS. GAGEL: 10 to 12 games they've participated in the past, your Honor, in the fall season.

MS. ROBERTSON: Your Honor, Laura Bielak is here. She's one of the seniors on the team; and she did play in that '90 fall season, if you want to ask her anything about that.

THE COURT: If you want to talk to her and make an offer of proof -- I promised my trial I'd get back to them at 2:00, so we need to wind this up.

What I want to do is find out what areas we're going to proceed on and how quickly and then see if we can get either another status report or a status conference, if we need it.

We've already talked about the insurance and the coach and the fall season and the contact of Mr. Mason to see if he can fill in and get some recruiting started, consideration of the talented walk-ons from the softball club. There is going to have to be some at least limited recruiting in view of the circumstances. You may have to make it clear to the young women that you're just offering a one-year scholarship. But there has to be something, because even if you get some good walk-ons and even if you have nine members, you're still probably going to be short, maybe not for the fall but definitely for the spring season.

If you have any other ideas -- I really would like you to rethink this idea of the playing field, too, because we had an affidavit from the plaintiffs on the fact that not only are the town fields still available for practice but the university fields certainly can be redone to accommodate women.

MS. GAGEL: Two or three quick comments, if I could, your

Honor. You covered most of the areas.

As Mr. Thro said, the Tenth Circuit two hours ago denied the motion for stay.

THE COURT: Is that when it happened? Two hours ago?

MS. GAGEL: So we shouldn't have any problem with moving forward at this time.

I am concerned: All the parties who submitted affidavits for us are in the courtroom today; and Ms. Allison, who is the executive director of the National Softball Coaches Association, has told me that the efforts to hire a head coach could be speeded up substantially. Within 72 hours, they could be publicizing that position with their organization. Within six days, the defendants could get the position announcement in the NCAA News. It can go in by March 21.

They already have nine coaches who have applied for the position; and CSU, during the time that we were having the permanent injunction hearing, your Honor -- they fired their football coach and they were able to hire a new one within four weeks and on an expedited basis after talking to six candidates.

And it doesn't seem impossible to expedite this process for the very reason that your Honor talked about, the recruiting. There are tournaments coming up, state high school championship tournaments. There is a large tournament in Boulder over the July 4 weekend. There are camps that are put on by the National Softball Coaches Association in June and July, where there are lots of high school players and lots of talent that can be viewed for recruiting purposes.

And I'm certainly hopeful that some of the people on the club team could make the team. I find it interesting since the defendants put on a great deal of testimony how they didn't play at a level of intercollegiate varsity softball that they now think they can draw the

entire team from the club team. I certainly hope they can get some people from that.

THE COURT: I'm sure they can get some. I'm sure they can get some. I'm not sure they can fill in the rest of the team; but the point is that I don't know what can be done, and neither does Mr. Thro. And what I need his a commitment that somebody who does know is going to do something quickly.

It seems to me if you can get a football coach in four weeks, you should be able to get a women's softball coach in four weeks, Mr. Thro. And if you can't, if you want to take a little more time with it, then I would feel comfortable -- I don't know how the plaintiffs feel, because I just threw this at them; but an experienced coach like the man who did coach the men's baseball team might really enjoy being an interim coach and trying to get this woman's fast softball team off the floor and going.

MS. GAGEL: Your Honor, I think it's a great idea -- I haven't talked to the plaintiffs -- at least to get him going and get him on the practice field.

The one last point I'd like to raise is about the scholarships that Mr. Thro addressed. There is one plaintiff, Heather Nakasone, who was supposed to receive a scholarship this year, but the team was not in place. I heard Mr. Thro to say that he was talking about maybe scholarships at some level to those who are receiving some who were receiving them before. He certainly is counting Heather Nakasone as one of plaintiffs, as one of the people remaining there to play softball; and I hope they'll be looking at each individual's situation as to grants and aid. And I'd like to get that commitment from them, because they're trying to make plans as to what they're going to do.

THE COURT: And that has to be done immediately, so that these students don't have to make a decision --

MS. GAGEL: Otherwise, they go home May 15 from finals and be in the same situation they were a year ago.

THE COURT: Let's see if we can have these decisions made by at least before the end of the school year, Mr. Thro.

What is the end of the school year?

MR. THRO: I think --

THE COURT: Is it May 15?

MR. THRO: Approximately.

Your Honor, with -- I'm unclear as to how you want us to proceed on the coach. The six-week time table that we outlined in our second status report is the university's normal procedure for filling a vacancy. Obviously, if you want to order us to disregard the university's normal procedure, we will do so, but --

THE COURT: Six weeks isn't June 1.

MR. THRO: Six weeks are -- a six week process with respect to applications. We intend to announce the position on April 1. Applications will then be due approximately May 15. There will then be a two-week interview time.

One of the problems we have in hiring coaches, your Honor, is many of these -- in fact, I think virtually everyone who has expressed an interest is currently involved with the season, this being softball season; so it's not very conducive to bring someone in for an interview if they're playing a competitive schedule.

In contrast, the situation with Coach Bruce and Coach Lubbick occurred after most teams had completed their regular season football schedule; and therefore, more people were available.

MS. GAGEL: Their seasons will be completed, I'm told by Ms. Allison, by the second week in May. As she stated in her affidavit, your Honor, there are a number of those coaches who are ready to come immediately. There is nothing holding them up.

THE COURT: Are we clear that there is no possibility of a spring, '93 season? Is that something that -- I don't want to require something that's an impossibility; but if there is some chance of getting a team for spring, '93 season, I'd like to talk about that.

MS. GAGEL: We would have loved to also, your Honor. There was a very small window of opportunity when the order came out. Some of the WAC teams at that time, we had been told by the WAC assistant commissioner, had some openings in their schedule; but things didn't move along at that point in time. The schedules already started for the spring, and a lot of the plaintiffs don't want to use a year of eligibility on a season that's not going to be all set. They save a year of eligibility.

THE COURT: All right.

MS. ROBERTSON: Your Honor, if I might address one thing Mr. Thro just raised, Sonny Lubbick, who was the football coach hired, came from the Miami Hurricanes. He was hired before the Hurricanes finished their season. And the newspaper article reported that they allowed him to remain at Miami and review film before their national championship game with Alabama, but he was hired long before the end of that season.

THE COURT: Because so many things really depend on the coach, its appears to me that the time limit, the suggested time of June 1, should be speeded up, because there has to be a coach in order to do the recruitment. Let's either get someone on board -- take your six weeks -- by the end of April, or lets get someone like Mr. Mason out there who is able to do the recruitment and the training based on his experience in baseball. And he is an employee,

I take it of CSU.

MR. THRO: Yes, he is, your Honor.

THE COURT: And therefore would fulfill your insurance requirements.

MR. THRO: Yes, he will. I believe that s correct.

THE COURT: So one or the other. Either have the new coach in six weeks --

MR. THRO: Or Mr. Mason.

THE COURT: -- or have Mr. Mason filling in so he can start the recruitment and have a new coach, then, by June 1.

MR. THRO: If Mr. Mason is somehow unavailable, is some other CSU employee who would be qualified --

THE COURT: I don't know who you have that's qualified to coach. You know, maybe a track coach would be able to, or maybe -- I don't know. Basketball? I really have no idea.

MS. GAGEL: Your Honor, I think --

THE COURT: Maybe some of the young women have an idea if there is anyone out there who would be suitable as a coach.

What about the field and the playing areas? Can you work together on that? It seems to me that's a minor thing; and I know I heard your whole story about why a basketball field isn't a softball field; but it seems to me even after hearing it that there can be some changes made so it can be used together with the available fields that are in Ft. Collins.

MS. GAGEL: Your Honor, I'm happy to sit down with Mr. Thro and try and go through what needs to be expedited.

The one final thing I would address is the athletic department has not contacted any of the plaintiffs since the order went into effect. It's been three weeks now, and I would ask that they address that on an expedited basis so that these plaintiffs know where they stand. I mean there has just been no contact with them.

THE COURT: Okay. I would hope that the attorneys, too, could talk about this. Maybe because of the lawsuit, CSU is concerned about making the contact. But certainly I have no objection if the athletic department contacts the women athletes and let's them know what's going to happen.

I would assume the women softball players that have been on the team will be the core of the new team, because people that come on either by being recruited or walk-ons or lateral transfers are certainly going to be new people; and the women that are on should know what's happening.

Is that something that you can talk about also, Ms. Gagel?

MS. GAGEL: I hope so, your Honor. I'm happy to do it.

MR. THRO: Your Honor, with respect to recruiting, prior to the decision to eliminate the softball and baseball perhaps, CSU had decided that in the future, scholarships for the softball team would be decided on an in-state rather than out-of-state basis. This meant that it was still possible to recruit someone out of state, but the amount of money would be in-state. So getting somebody from out of state would cost them two scholarships.

This is not unusual among CSU's nonrevenue sports, but it does represent a change from the national recruiting patterns that we saw prior to 1991, and I obviously do not want to get into trouble

with you, if CSU pursues a Colorado-only recruiting policy and you had intended a national recruiting policy.

THE COURT: What does -- what does the --

MS. GAGEL: Your Honor, this is the first --

THE COURT: What are the requirements as far as recruiting? Does it have to be on a national basis, or can state people be preferred, or considered?

MS. GAGEL: State people can probably be preferred. And one of the problems that CSU will face in recruiting, my understanding, your Honor, is many Colorado students have already signed in the early signing period in November; so the pool of available talent in Colorado, since we're moving into the end of the second recruiting season -- there may not be all the people they need for the team there.

They've always recruited nationally. I'm not saying not to recruit in Colorado. We absolutely encourage it.

THE COURT: Why can't we leave it at this: The first big effort will be to find Colorado women that are eligible. If you can't, you may have to go national.

But I noticed in the Big 8 tournament that the Oklahoma and the Oklahoma State women's basketball teams are almost totally Oklahoma women; and so they are recruited from in state, if possible. There may be a couple Texans on each team; but other than that, they're Oklahoma.

So I would think that there is a lot of talent in Colorado; and try to use that talent, if you can.

MS. GAGEL: Your Honor, I don't disagree with that at all.

I think we'd all like to move toward that.

My concern is what I just heard from Mr. Thro is he's going to change the rules of the game on some of the current plaintiffs who receive out-of-state tuition; and I'm not clear on how they intend to deal with those people from out of state.

MR. THRO: Your Honor, we are not going to change the rules of the game with respect to the out-of-state plaintiffs. This was a policy which was to go with -- was decided on in, I believe, October of 1991 and was to apply to the future.

Obviously, those people that are in state or that are out of state are going to continue to receive out-of-state aid.

A out-of-state scholarship at CSU costs approximately twice what an in-state scholarship costs; so when we budget for the softball team as to how much money is going to spent on scholarships, it makes a huge difference.

THE COURT: You know, it's nothing that I can tell you. There may be a great number of extremely talented women from Colorado athletes who are available for scholarships. There may be none. I don't know that. So I think there has to be some efforts.

I think what I'd like to do is keep a tight hold on this case to make sure we don't have any more problems and maybe set this down, let you talk, let you see what you can work out, but set it down for another status hearing/conference. And I don't even care if I just have the attorneys. If everybody else want to come, that's fine; but I primarily want to hear what's happening in a short period of time, three weeks, four weeks from now, just to see what has been accomplished, what -- Maybe I could have a report, too, to know whether we're going to have a coach by the end of April, or we're going to have an interim coach, someone like Mr. Mason or someone else that's really experienced at coaching, and then push it till June.

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And we absolutely need someone like a coach or like Mr. Mason to get involved in the recruiting.

MS. GAGEL: Your Honor, I'd love to set a report much sooner than three weeks, to make sure that we're moving forward quickly.

THE COURT: That's fine. You want to? Fine. A week?

MS. GAGEL: One week.

THE COURT: When do you want, Ms. Gagel?

MS. GAGEL: That would be great. Thank you, your Honor.

MR. THRO: Your Honor, I have a couple of other questions just to clarify.

THE COURT: Surely.

MR. THRO: With regard to recruiting, we talked about the problems of offering -- potentially offering a scholarship to someone. Do you want -- in recruiting, are you ordering us to offer scholarships, or is that within our discretion, or --

THE COURT: You think you're going to be able to recruit varsity talent without scholarships?

MR. THRO: Being the only Division I school in the State of Colorado that has a softball program, perhaps.

MS. GAGEL: Your Honor, CSU didn't worry about this. 7 of the 18 people on the team when they terminated the team were freshmen, and it didn't seem to concern them then. Mr. Thro has suggested scholarships are limited to one year; so if someone is going to Nebraska, I guess they anticipate only one year of a scholarship,

just the same as they would at CSU.

I'm not quite certain what the problem is, since that's been their position throughout this: that a scholarship is for one year.

MR. THRO: Your Honor, I am only attempting to make absolutely certain that we fully understand your order. I mean if we go out and attempt to recruit and do not offer scholarships and no one wants to sign with CSU --

THE COURT: If you can get top flight women athletes for this team without offering scholarships, more power to you. You'll save the school a lot of money. I'm not sure you can. I don't want this to be done in a slipshod manner. I think when my order indicated that the softball team was to be reinstated and we want to make sure they have a good season, there is to be good players. You're not just to get players that can't live up to the expectations of being top flight varsity players.

Now, I don't know who is out there. Here's a young lady who is now a junior in high school whose mother says she really want to go to CSU. Now, whether she wants some sort of a scholarship, I don't know.

MR. THRO: I imagine when NCAA rules allow that, coaches might be talking to her; but, you know, --

THE COURT: I wish I could order enthusiasm, because if I could, I would order that CSU be enthusiastic about complying with the Court's order. That's what I really want.

MR. THRO: Your Honor, I know the hour is late; but if I may clarify my notes on your order so that we know what is happening, you are ordering us to hire a new head coach by the end of April, or to have an interim head coach in place. You're ordering us to

have --

THE COURT: Well, if you have an interim head coach in place, then you've got a little time, till June.

MR. THRO: Do you want us to have an interim head coach from now till late April, if that's the route we decide

THE COURT: I'd sure like to have somebody there, because I think practice should start tomorrow.

MR. THRO: Your are also ordering us to have a fall season of at least some duration, but the length of that is up to us?

THE COURT: Yes, and I think you may want to consult with someone like Ms. Allison or someone who is knowledgeable, yes.

MR. THRO: And you are ordering us to actively recruit.

THE COURT: Yes. And prepare a field and make sure that you do what you have to do to get a team out there, which means if you need equipment and uniforms, you're going to have to so a few patches on the uniforms.

MR. THRO: Thank you, your Honor.

THE COURT: Status report in one week?

MR. THRO: One week.

MS. GAGEL: Thank you, your Honor.

THE COURT: Do you want to set another hearing, or not?

Why don't I see what the status reports say; and I'm not going to hesitate to set a hearing, if I have to.

MS. GAGEL: Let's see if we can make some progress.

THE COURT: Please stay in close touch with the defendants. And I wish I had been on top of this a little earlier in realizing that nothing was happening; and I want to make sure that the plaintiffs stay on top of this and let me know if there is any problems.

MS. GAGEL: Understood, your Honor.

THE COURT: Thank you very much.

Court is in recess.

(Thereupon, the hearing was concluded and the Court recessed at 1:10 p.m.)

* * * *

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated at Denver, Colorado, this 12th day of March, 1993.

APPENDIX C

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JENNIFER ROBERTS; JULIE OSBORNE; JANET BRUMBELOW; LAURA BIELAK; SARA STOUT; AMY RECOUPER; JENNIFER JACOBS; MALIA KUENZLI; STACIE STAFFORD; HEATHER NAKASONE; KIM JOHNSON; AIMEE RICE; LISA MIZE,	)	
Plaintiffs-Appellees,	)	
v.	)	
COLORADO STATE BOARD OF AGRICULTURE, in its capacity as the entity charged with the general control and supervision of Colorado State University,	)	No. 93-1052
Defendant-Appellant.	)	
COLORADO STATE UNIVERSITY,	)	
Defendant.	)	
JENNIFER ROBERTS; JULIE OSBORNE; JANET BRUMBELOW; LAURA	)	

BIELAK; SARA STOUT; AMY RECOUPER; JENNIFER JACOBS; MALIA KUENZLI; STACIE STAFFORD; HEATHER NAKASONE; KIM JOHNSON; AIMEE RICE; LISA MIZE,

Plaintiffs-Appellees,

v. No. 93-1086

COLORADO STATE BOARD OF AGRICULTURE, in its capacity as the entity charged with the general control and supervision of Colorado State University,

Defendant-Appellant.

Appeals from the United States District Court
for the District of Colorado
(D.C. No. 92-Z-1310)

Before McKAY, Chief Judge, LOGAN and ANDERSON, Circuit Judges.

LOGAN, Circuit Judge.

The Colorado State Board of Agriculture (SBA or defendant)[1]

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[1] Although Colorado State University (CSU) is also a named defendant, as we discuss hereafter it is not a party to the appeal. Because we also hold that the Colorado State Board of Agriculture (SBA) is a proper appellant, the entity in financial control of CSU and apparently the only entity capable of

appeals the decision of the district court finding that it violated Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 - 1688, and ordering it to reinstate the women's fast pitch softball team at Colorado State University (CSU) with all of the incidental benefits of a varsity team.

Plaintiffs, CSU students and former members of the fast pitch softball team, brought suit in their individual capacities[2] against SBA and CSU in June 1992 after CSU announced that it was discontinuing the varsity fast pitch softball program. In February of this year the district court found that SBA and CSU had violated Title IX, and issued a permanent injunction reinstating the softball program. Approximately three weeks later, the district court held a status conference and, in the face of apparent foot-dragging by defendant, amplified its earlier orders to require defendant to hire a coach promptly, recruit new members for the team, and organize a fall season. This court denied a motion for a stay but expedited the appeal.

Plaintiffs first contest our jurisdiction to hear these appeals. On the merits, defendant contends that the district court erred in finding a Title IX violation. Defendant also maintains that even if the verdict was correct, the district court abused its discretion when it ordered reinstatement of the softball team and required defendant to follow

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being sued under state law, we use the singular "defendant" in this opinion with the understanding that SBA's involvement in this appeal concerns its administration of CSU.

We grant the motion of the Trial Lawyers for Public Justice and the National Association for Girls and Women in Sport to file an amicus brief. We grant that part of plaintiffs' motion to clarify the caption of the appeal to show CSU as a defendant only instead of as an appellant. We deny all other motions before us.

[2] Title IX contains an implied private cause of action. *Cannon v. University of Chicago*, 441 U.S. 677, 717 (1979).

specific directions in effecting that reinstatement rather than affording defendant the opportunity to present a plan that would bring it into compliance with Title IX.

We review a district court's interpretations of law de novo, *Eastman Kodak Co. V. Westway Motor Freight*, 949 F.2d 317, 319 (10th Cir. 1991), and its findings of fact for clear error. *Mid-America Pipeline v. Lario Enters.*, 942 F.2d 1519, 1524 (10th Cir. 1991). We review a district court's choice of equitable remedies for abuse of discretion. *Keyes v. School Dist. No. 1*, 895 F.2d 659, 665 (10th Cir. 1990), *cert. denied*, 498 U.S. 1082 (1991).

I

We consider first the challenges to our jurisdiction over these appeals. Plaintiffs maintain that because defendant failed to name CSU as a party in its notice of appeal, and because parties seeking appellate review must join all of their co-plaintiffs or co-defendants, we must dismiss this appeal. There is no substance to plaintiffs' argument that SBA cannot appeal the district court's decision without joining CSU as its co-appellant. This archaic practice of summons and severance was abolished by original Civil Rule 74 in 1937, *see* 9 James W. Moore et al., *Moore's Federal Practice* ¶ 203.27 (1993), and was "assumed to be sufficiently obsolete as no longer to require pointed abolition" when the Federal Rules of Appellate Procedure were adopted. Fed. R. App. P. 3 advisory committee's note (1967 adoption).

CSU, not having been named in the notice of appeal, is not a party to the appeal. *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314 (1988). The real question, however, is whether SBA, which is named, is the proper party appellant to require us to reach the merits of the issues raised. Plaintiffs argue that because CSU has not appealed, the district court's order is final and enforceable against it, and SBA's appeal is irrelevant. In light of the statutory scheme

creating SBA and CSU, however, CSU is powerless to comply with the district court's order on its own and the relief plaintiffs seek may only be obtained against SBA. The Colorado legislature established CSU and SBA as separate entities, Colo. Rev. Stat. § § 23-30-101, 23-31-101. While SBA was constituted as "a body corporate, capable in law of suing and being sued," *id.* § 23-30-102, the statutes and constitutional provisions pertaining to CSU contain no similar grant. *See id.* § § 23-31-101 to 136; Colo. Const. art. VIII, § 5(1). Furthermore, although CSU maintains control over certain internal institutional policies, *see, e.g.*, Colo. Rev. Stat. § 23-31-104 (faculty and board together determine curriculum); *id.* § 23-31-114 (faculty establishes rules of governance and discipline), SBA has general control and supervisory power including "power to adopt ... regulations ... to secure the successful operation of the university," *id.* § 23-31-108, hiring authority, *id.* § 23-31-109, and complete financial control over CSU, *id.* § 23-31-120; Colo. Const. art. VIII, § 5(2); *see also Lewis v. State Bd. of Agriculture*, 335 P.2d 546, 550 (Colo. 1959). Under this scheme, even if CSU were capable of being sued, any adverse verdict or remedial order entered against CSU concerning hiring or funding would have to operate against SBA. Thus, CSU was an unnecessary party to the suit to begin with, and we see no legal impediment to reaching the merits with only SBA as appellant.

Plaintiffs also dispute SBA's right to appeal separately the measures ordered at the March 1993 status conference. Defendant counters with an argument that because it had appealed the injunctive order the district court was divested of jurisdiction to make any change in the injunction. We are satisfied that we have jurisdiction to review the measures ordered at the status conference either through defendant's appeal of the original jurisdiction order or its separate appeal of the specific obligations imposed at the March hearing. The district court refused a stay of the injunction, and this court also refused a stay pending appeal. The district court's injunction required it to supervise a continuing course of conduct. Absent a stay "an appeal from the supervisory order does not divest the district court of

jurisdiction to continue its supervision." *Hoffman v. Beer Drivers & Salesmen Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976). *See also NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987). Indeed, Fed. R. App. P. 8(a) expressly recognizes this continuing power of a district court as it requires an application for an order "modifying ... an injunction during the pendency of an appeal" to be made in the first instance to the district court. *See also* Fed. R. Civ. P. 62(c) (district court may modify injunction during pendency of an appeal).

In light of the district court's continuing authority, if the specific directives imposed at the March status conference amount to "modifying" the injunction, they are subject to appeal under the express terms of 28 U.S.C. § 1292(a)(1). If they merely implement the original injunctive order or "clarify" it, they are not separately appealable. *See Motorola Inc. v. Computer Displays Int'l*, 739 F.2d 1149, 1155 (7th Cir. 1984) (An order is a clarification if it "does not change the parties' original [legal] relationship, but merely restates that relationship in new terms."); *Mikel v. Gourley*, 951 F.2d 166, 169 (8th Cir. 1991); *Sierra Club v. Marsh*, 907 F.2d 210, 212 - 13 (1st Cir. 1990). In that event, however, since the injunction itself is properly before us, we see no difficulty in reviewing the specific requirements -- to hire a coach, recruit players, and schedule a fall season -- that the district court imposed on defendant.

II

Defendant maintains that, as a matter of law, it did not violate Title IX. Title IX provides that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Since 1988, Title IX has applied to recipients of federal funds in all of their operations. *Id.* § 1687. The statute delegated to the Secretary of Health, Education and Welfare (now the

Secretary of Education)[3] the responsibility to promulgate regulations implementing Title IX, including specifically "intercollegiate athletic activities." Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974). Title 34, § 106.41, of the Code of Federal Regulations applies Title IX to college athletics.

A

This controversy concerns one subpart of the regulations implementing Title IX. 34 CFR § 106.41(c) provides:

> A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director [of the Office for Civil Rights] will consider, among other factors:
>
> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes[.]

Although § 106.41(c) goes on to list nine other factors that enter into a determination of equal opportu..ity in athletics,[4] an institution may violate Title IX simply by failing to accommodate effectively the

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[3] After Title IX was passed, the Department of Health, Education, and Welfare was divided into the Department of Health and Human Services and the Department of Education; the latter, acting through the OCR, is now the agency charged with administering Title IX.

[4] These other factors include provision of equipment and supplies, scheduling of game and practice times, travel allowances, assignment of coaches and tutors, and provision of locker room and practice facilities. 34 CFR § 106.41(c)(2)-(10).

interests and abilities of student athletes of both sexes. *See Cohen v. Brown Univ.*, No. 92-2483, 1993 U.S. App. LEXIS 7912, at *21 - 22 (1st Cir. Apr. 16, 1993); *Favia v. Indiana Univ. of Penn.*, 812 F. Supp. 578, 584 - 85 (W.D. Pa. 1993); *see also* 44 Fed. Reg. 71,413, 71,415 - 17 (1979) (HEW Title IX Intercollegiate Athletics Policy Interpretation, describing the three major areas of regulatory compliance as "Athletic Financial Assistance (Scholarships)," "Equivalence in Other Athletic Benefits and Opportunities," and "Effective Accommodation of Student Interests and Abilities"); Office for Civil Rights, Department of Education, Title IX Athletics Investigator's Manual 7 (1990) [hereinafter Investigator's Manual] ("[a]n investigation may be limited to less than all three of these major areas").

In 1979, the Department of Health, Education, and Welfare issued a policy interpretation explaining the ways in which institutions may effectively accommodate the interests and abilities of their student athletes. *See* Policy Interpretation, 44 Fed. Reg. 71,413 (1979). We defer substantially to an agency's interpretation of its own regulations. *Martin v. Occupational Safety & Health Review Comm'n*, 111 S. Ct. 1171, 1175 (1991). This is especially so when, as here, they are effectively legislative, pursuant to a statutory delegation. The Policy Interpretation delineates three general areas in which the OCR will assess compliance with the effective accommodation section of the regulations, as follows:

a. The determination of athletic interests and abilities of students;
b. The selection of sports offered; and
c. The levels of competition available including the opportunity for team competition.

44 Fed. Reg. at 71,417. Despite some similar and overlapping language in the Policy Interpretation's discussion of these three broad policy areas, a close reading of the application sections immediately

following this initial statement of policy reveals that plaintiffs' claim concerns their opportunity to participate in team competition. The OCR assesses effective accommodation with respect to opportunities for intercollegiate competition by determining:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> (2) Where the members of one sex have been and are under-represented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) Where the members of one sex are under-represented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

Id. at 71,418.

In effect, "substantial proportionality" between athletic participation and undergraduate enrollment provides a safe harbor for recipients under Title IX. In the absence of such gender balance, the institution must show that it has expanded and is continuing to expand opportunities for athletic participation by the under-represented gender, or else it must fully and effectively accommodate the interests and abilities among members of the under-represented gender.

In addition to assessing whether individuals of both sexes have

the opportunity to compete in intercollegiate athletics, the OCR also examines whether the quality of competition provided to male and female athletes equally reflects their abilities. This will depend on whether, program wide, the competitive schedules of men's and women's teams "afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities," *id.*, or "[w]hether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex." *Id.* However, "[i]nstitutions are not required to upgrade teams to intercollegiate status or otherwise develop intercollegiate sports absent a reasonable expectation that intercollegiate competition in that sport will be available within the institution's normal competitive regions." *Id.*

B

The district court found that plaintiffs met their burden of showing that defendant could not take shelter in the safe harbor of substantial proportionality.[5] The district court reviewed a substantial

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[5] Although the Policy Interpretation does not clearly place the burden of showing a disparity between the gender composition of a school's athletic program and the gender composition of its overall enrollment on the party challenging the school's Title IX compliance, the statute itself provides some guidance. Title IX provides that its prohibition against gender discrimination in federally funded programs shall not

> be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration

quantity of statistical data, and made the undisputed finding that following the termination of the varsity softball program, the disparity between enrollment and athletic participation for women at CSU is 10.5%. Defendant maintains that, as a matter of law, a 10.5% disparity is substantially proportionate.[6]

The OCR has instructed its Title IX compliance investigators that "[t]here is no set ratio that constitutes 'substantially proportionate' or that, when not met, results in a disparity or a violation." Investigator's Manual at 24. However, in the example immediately preceding this statement, the Manual suggests that substantial proportionality entails a fairly close relationship between athletic participation and undergraduate enrollment.[7] Furthermore, in a Title IX compliance review completed in 1983, the OCR found that CSU's athletic participation opportunities for men and women were not substantially proportionate to their respective enrollments. During the three years that were the subject of that review, the differences between women enrolled and women athletes were 7.5%, 12.5%, and 12.7%. The district court relied on these sources, as well as expert testimony that a 10.5% disparity is statistically

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> in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists....

20 U.S.C. § 1681(b). Because an institution is not required to maintain gender balance, it is fair to conclude that proving an imbalance lies with the plaintiff.

[6] We reject defendant's argument that the district court's decision implicitly requires CSU to maintain parity between women's athletic participation and women's enrollment. The district court applied all three prongs of the effective accommodation test; CSU's failure to meet substantial proportionality did not preclude it from complying with Title IX in either of the other two approved methods.

[7] "[I]f the enrollment is 52% male and 48% female, then, ideally, about 52% of the participants in the athletics program should be male and 48% female...." Investigator's Manual at 24.

significant, in concluding that CSU could not meet this first benchmark. *See also Cohen v. Brown Univ.*, 809 F. Supp. 978, 991 (D.R.I. 1992) (11.6% disparity not substantially proportionate) *aff'd*, No. 92-2483, 1993 U.S. App. LEXIS 7912 (1st Cir. Apr. 16, 1993). Without demarcating further the line between substantial proportionality and disproportionality, we agree with the district court that a 10.5% disparity between female athletic participation and female undergraduate enrollment is not substantially proportionate. The fact that many or even most other educational institutions have a greater imbalance than CSU does not require a different holding.

C

The district court also found that defendant could not prove a history and continuing practice of expansion in women's athletics at CSU.[8] Defendant argues that the district court should have given greater weight to its dramatic expansion of women's athletic opportunities during the 1970s. In essence, defendant suggests reading the words "continuing practice" out of this prong of the test. In support of this position, defendant offers anecdotal evidence of enforcement at other institutions, and the OCR's 1983 finding of compliance for CSU, which was contingent upon CSU's fulfilling the provisions of a plan that CSU never met.

Although CSU created a women's sports program out of nothing in the 1970s, adding eleven sports for women during that decade, the district court found that women's participation opportunities declined steadily during the 1980s. Furthermore, although budget cuts in the last twelve years have affected both men and women athletes at CSU, the district court found that women's

[8] Here the language of the Policy Interpretation clearly places the burden of proof on the institution: "whether the institution can show a history and continuing practice of program expansion." 44 Fed. Reg. 71,418.

participation opportunities declined by 34%, whereas men's opportunities declined by only 20%. The facts as found by the district court (and largely undisputed by defendant) can logically support no other conclusion than that, since adding women's golf in 1977, CSU has not maintained a practice of program expansion in women's athletics, and indeed has since dropped three women's sports. *See* Appellant's Opening Brief at 7 - 8 n.4.

We recognize that in times of economic hardship, few schools will be able to satisfy Title IX's effective accommodation requirement by continuing to expand their women's athletics programs. Nonetheless, the ordinary meaning of the word "expansion" may not be twisted to find compliance under this prong when schools have increased the relative percentages of women participating in athletics by making cuts in both men's and women's sports programs. Financially strapped institutions may still comply with Title IX by cutting athletic programs such that men's and women's athletic participation rates become substantially proportionate to their representation in the undergraduate population.[9]

D

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[9] *See Cohen*, 1933 U.S. App. LEXIS 7912, at *28 n.15:

> Title IX does not require that a school pour ever-increasing sums into its athletic establishment. If a university prefers to take another rout, it can also bring itself into compliance with the first benchmark of the accommodation test by subtraction and downgrading, that is, by reducing opportunities for the over-represented gender while keeping opportunities stable for the under-represented gender (or reducing them to a much lesser extent).

The district court found that defendant could not demonstrate that CSU's athletic program fully and effectively accommodated the interests and abilities of women athletes. Here we hold that the district court improperly placed the burden of proof on defendant. Because a Title IX violation may not be predicated solely on a disparity between the gender composition of an institution's athletic program and the gender composition of its undergraduate enrollment, *see* 20 U.S.C. § 1681(b), plaintiff must not only show that the institution fails on the first benchmark of substantial proportionality but also that it does not fully and effectively accommodate the interests and abilities of its women athletes. *See Cohen*, 1993 U.S. App. LEXIS 7912, at *14. Further, an institution would be hard-pressed to establish the full and effective accommodation of the interests and abilities of its women athletes in the abstract. The ultimate burden must lie with the plaintiffs to show that they have been "excluded form participation in, [or] denied the benefits of" an athletic program "on the basis of sex." 20 U.S.C. § 1681(a). However, if plaintiffs establish that their interests and abilities are not being accommodated by the university's athletic program, the institution may still decline to upgrade or create an intercollegiate team if there is no reasonable expectation of competition for that team within the institution's normal competitive region.[10]

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[10] Defendant improperly relies on a provision of the Policy Interpretation pertaining to the second broad policy area, the selection of sports offered, which provides that effective accommodation requires establishing a team only if "[t]here is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team." 44 Fed. Reg. at 71,418. This language applies only when a university sponsors a team in a noncontact sport for one sex, but not for the other.

The Investigator's Manual addresses and obviates the possibility that one talented softball player could force the creation of an entire team. The Manual instructs investigators assessing accommodation of interests and abilities under the third prong of the effective accommodation test to review "whether the institution failed to accommodate 'expressed interest,' for

The district court's misallocation of the burden of proof is not fatal in this case. Faced with a similar situation, the First Circuit held that it could make the proper legal determination because the record on this point had been fully developed. *See Cohen*, 1993 U.S. App. LEXIS 7912, at *46 - 47. In the case before us the district court made extensive findings concerning the unmetabilities and interests of the plaintiff softball players, and the feasibility of their organizing a competitive season of play. The district court credited the plaintiffs' testimony regarding their commitment to softball, the recognition they have achieved both as a team and as individuals, and the substantial interest in softball among first year CSU students who are participating in a club team. The district court also credited testimony that softball is increasing in popularity among high school students in Colorado. Although CSU's traditional rivals do not field softball teams, there is no dispute that before the CSU softball team was terminated it played a competitive schedule within its athletic conference. Because the record is more than adequate in this regard, we are able to consider the question of effective accommodation, placing the burden of proof on the plaintiffs.

The heart of the controversy is the meaning of the phrase "full and effective accommodation of interests and abilities." Defendant maintains that even if there is interest and ability on the part of women athletes at CSU, the university is obliged to accommodate them only to the extent it accommodates men. Thus, the argument goes, plaintiffs cannot be heard to complain because both women's softball and men's baseball were eliminated in the last round of cuts and there are more disappointed male than female athletes at CSU. The First Circuit rejected this position in *Cohen*, and so do we. "[T]his benchmark sets a high standard: it demands not merely some

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example, athletes of the under-represented sex participating in a club sport express interest in intercollegiate ... competition *or sufficient numbers of individuals to form a team request that a sport be offered.*" Investigator's Manual at 25 (emphasis added).

accommodation, but full and effective accommodation. If there is sufficient interest and ability among members of the statistically under-represented gender, not slaked by existing programs, an institution necessarily fails this prong of the test." *Id.* at *26.

Based on the district court's subsidiary findings of fact, we conclude that plaintiffs met the burden of showing the CSU has not accommodated their interests and abilities fully and effectively. Questions of fact under this third prong will be less vexing when plaintiffs seek the reinstatement of an established team rather than the creation of a new one.[11] Here, plaintiffs were members of a successful varsity softball team that played a competitive schedule as recently as the spring of 1992. Although apparently four plaintiffs have transferred and one has been dismissed, seven or eight plaintiffs remain at CSU for at least part of the 1993-94 school year and would be eligible to play on a reinstated team. We agree with the district court that CSU fails the third prong of effective accommodation test.[12]

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[11] *See Cohen*, 1993 U.S. App. LEXIS 7912, at *47:

> Although the full and effective accommodation of athletic interests is likely to be a complicated issue where allegedly under-represented plaintiffs sue to force a university to create a neoteric team or upgrade the status of a club team, there is unlikely to be any comparably turbid question as to interest and ability where, as here, plaintiffs are seeking merely to forestall the interment of healthy varsity teams.

(citation omitted).

[12] The OCR agrees that in situations such as the one presented here, a violation is likely:

> OCR investigative experience indicates that

E

Finally, defendant argues that the district court erred in holding that plaintiffs were not required to show discriminatory intent. Defendant reasons that because Title IX was modeled on Title VI of the Civil Rights Act of 1964, 42 U.S.C. § § 2000d to -4a, and because discriminatory intent is required to prove a violation of Title VI, *see Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 608 n.1 (1983) (Powell, J., concurring), proof of a Title IX violation must therefore also require intentional discrimination.

Defendants neglect to consider the additional holding of

> where budget restrictions have led a recipient to eliminate sports previously offered, there is frequently a compliance problem with this program component. The tendency is for institutions to eliminate a sport previously offered to women who are already under-represented in the institutions' athletic programs. The result has been that women are now more disadvantaged by the elimination of a women's team despite sufficient interest and ability to sustain a viable team. In this situation, the institution may well be in violation of this program component. In effect, the participation rates of men and women are not proportionate to their enrollment rates such that women are under-represented in the athletics program, and the institution is not meeting expressed interests and abilities of female students. Therefore, the institution is not equally effectively accommodating the athletic interests and abilities of male and female students.

Investigator's Manual at 27.

Guardians, that "although Title VI itself requires proof of discriminatory intent, the administrative regulations [under Title VI] incorporating a disparate-impact standard are valid." *Id.* at 584 n.2 (opinion of White, J.). Plaintiffs' complaint alleges violations both of Title IX and of the implementing regulations. If we accept defendant's analogy to Title VI, then *Guardians* would permit us to find a violation of Title IX's regulations without proof of discriminatory intent. *See Haffer v. Temple Univ.*, 678 F. Supp. 517, 539-40 (E.D.Pa. 1987), *modified*, 1988 U.S. Dist. LEXIS 761.[13]

Further, despite the fact that Title IX was explicitly modeled on Title VI, this court has held that Tile VII of the Civil Rights Act of 1964, 42 U.S.C. § § 2000e to -17, is "the most appropriate analogue when defining Title IX's substantive standards, including the question of whether 'disparate impact' is sufficient to establish discrimination under Title IX." *Mabry v. State Bd. of Community Colleges & Occupational Educ.*, 813 F.2d 311, 316 n.6 (10th Cir.), *cert. denied*, 484 U.S. 849 (1987).[14] Because it is well settled that Title VII does not require proof of overt discrimination, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); 42 U.S.C. § 2000e-2(k), the district court did not err here in failing to require proof of discriminatory intent.

III

Defendant makes two broad objections to the relief ordered by

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[13] The Supreme Court's recent decision in *Franklin v. Gwinnett County Pub. Schs.*, 112 S. Ct. 1028, 1038 n.8 (1992), addressing the intent requirement only with respect to monetary damages for a Title IX violation, is not to the contrary.

[14] We believe, however, that Title IX and its implementing regulations offer enough guidance in setting the burden of proof that application of the Title VII model in that regard is not necessary. *See supra* part II D and nn. 5 & 8.

the district court. First, it maintains that plaintiffs have an adequate remedy at law and therefore injunctive relief is inappropriate. Second, defendant argues that it should have been afforded the opportunity to present a plan to the court that would have brought it into compliance with Title IX, rather than ordered to reinstate the softball program and required to take other specific actions with respect to its management of the team.

A

Defendant suggests for the first time on appeal that because plaintiffs have settled their damages suit, they have been made whole and injunctive relief is unnecessary. We draw no such conclusion. Plaintiffs' damages action is not before us, and we do not presume to know for what they are being compensated. However, insofar as defendant's continuing violation of Title IX operates to deprive plaintiffs of the opportunity to play softball, we believe monetary relief alone is inadequate. The district court correctly ordered an equitable remedy.

B

Defendant's second argument has more substance. Defendant contends that the district court abused its discretion by prescribing the precise manner in which it must comply with Title IX. Defendant objects to the specificity of the district court's order because it believes the district court has ordered it to maintain a softball team in perpetuity, and because it believes it is entitled to devise a plan for its own compliance. Were this a class action, there might be some power to defendant's argument that an order specifically requiring an institution to maintain a softball team goes further than is necessary to correct a violation of Title IX. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) ("As with any equity case, the nature of the violation determines the scope of the

remedy."); *Cohen*, 1993 U.S. App. LEXIS 7912, at *56 ("Title IX does not require institutions to fund any particular number or type of athletic opportunities"). In a class action case a more appropriate remedy for violation might be to enjoin CSU's conduct of men's varsity competition until defendant presented a plan that would bring CSU into compliance with Title IX. This is, however, an action for relief to individual plaintiffs, brought in their individual capacities.

The district court's order of relief directly responds to the harms plaintiffs have sustained, and the relief they have requested, as individuals. Plaintiffs are former members of a terminated varsity program, seeking reinstatement of their team because of defendant's failure to comply with Title IX. The Supreme Court has recognized that in reaching Title IX's goal of protecting private citizens against discriminatory practices, there are situations in which "it makes little sense to impose on an individual, whose only interest is in obtaining a benefit for herself, ... the burden of demonstrating that an institution's practices are so pervasively discriminatory that a complete cutoff of federal funding is appropriate." *Cannon*, 441 U.S. at 705. This is such a situation. "The award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with -- and in some cases even necessary to -- the orderly enforcement of [Title IX]." *Id.* at 705 - 06. The district court correctly provided plaintiffs with individual relief. Had the district court allowed defendant to devise its own plan for Title IX compliance, it would, in effect have been forcing plaintiffs to become unwilling representatives in a class action suit they chose not to bring.

Because this is not a class action, the broad sweep of the remedy exists only in defendant's imagination. The district court's order does not apply to Colorado high schools. It does not reach any other college or university. It does not extend the effective accommodation test to any other department of CSU. It does not even require CSU to institute women's varsity soccer or alpine skiing,

as defendant fears.[15] Only the CSU softball players have established that their athletic interests and abilities are not being accommodated effectively under Title IX. Therefore, relief is appropriate only for them. Moreover, because this relief runs to plaintiffs individually, defendant is incorrect in its assumption that CSU must sustain a softball team indefinitely. To the contrary, once all the plaintiffs in this case have transferred or graduated, defendant could return to court and seek to have the injunction dissolved. *See United States v. Swift & Co.*, 286 U.S. 106, 114 (1932) (recognizing "the power of a court of equity to modify an injunction in adaptation to changed conditions"); *Cook v. Colgate Univ.*, No. 92-9175, 1993 U.S. App. LEXIS 9695 at *6 - 7 (2d Cir. Apr. 28, 1993) (vacating as moot a district court order granting varsity status to a women's ice hockey team because all the plaintiffs would have graduated before the order took effect).

Further, because the reinstatement of the softball team is predicated upon defendant's Title IX violation, if that violation were remedied in accordance with either of the other two benchmarks of the effective accommodation test defendant would then no longer be obligated to maintain its softball program. If, for example, defendant chose to cut its athletic programs in such a way as to meet the substantial proportionality benchmark, plaintiffs would have no basis for asserting their right to play softball. The district court acknowledged this in its order: "The underlying mandate of this opinion is that CSU may not continue to operate an intercollegiate athletic program that provides a disproportionate amount of participation opportunities to male athletes where there is no evidence of continuing program expansion or effective accommodation of the

---

[15] If, as the district court suggests in dicta, *Roberts v. Colorado State University*, 814 F. Supp. 1507, 1517-18 (D. Colo. 1993), there are female soccer players and alpine skiers at CSU who are aggrieved by the lack of opportunity for varsity competition in their sports, nothing prevents them from bringing suit against defendant for failing to accommodate them effectively as well. That is not the lawsuit before us.

interests and abilities of its female students." *Roberts*, 814 F. Supp. at 1519. If defendant decided to operate CSU's athletic program in compliance with the underlying mandate of the district court's opinion, plaintiffs' entitlement to individual relief would evaporate.

Finally, we turn to the specifics of the district court's order. Defendant alleges that aspects of the injunction amount to the district court's "miscromanaging" CSU's softball program. In one respect, we agree. Under the broad sweep of Title IX, *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982), the district court has the power to ensure that the reinstated softball program receives all the incidental benefits of varsity status. Thus, we find ample support for the district court's insistence that defendant promptly hire a softball coach, *see* 34 CFR § 106.41(c)(5) (equal opportunity in athletics includes the opportunity to receive coaching), prepare a field for the softball team's use, *see id.* § 106.41(c)(7) (practice and competitive facilities), and provide equipment and uniforms, *see id.* § 106.41(c)(2) (equipment and supplies). The district court also emphasized that defendant must recruit members for its reinstated team, although it did not require defendant to offer scholarships to new recruits. Clearly the district court was concerned that reinstatement of the softball team was not to be done "in a slipshod manner." Appellant's App. at 97. However, insofar as recruiting is integral to team development, it is a core coaching function. Under the Title IX regulations, defendant would not be permitted to hobble a coach's efforts to improve his or her team. Because the district court clearly did not order defendant to offer scholarships, we interpret its order regarding recruiting as part and parcel of its order to hire a coach. Any suggestion that this coach must recruit "top flight varsity players," *id.* at 98, is merely precatory.

The district court did exceed its authority in demanding that the softball team play a fall 1993 exhibition season. The district court's apparent rationale for ordering a fall season, which had not previously been a regular practice at CSU, was to ensure that CSU would be able to field a "competitive" team the following spring. *See id.* at 80

("If you don't have [a] fall of '93 season, I don't see how you're going to have a competitive team in '94"). Nothing in Title IX requires an institution to create a "top flight" varsity team, *see id.* at 97, nor is it within the district court's power, once it reinstates the softball program with all the incidental benefits of varsity status, "to make sure they have a good season." *Id.* Because a fall season is not required to effect the appropriate remedy, we hold that the district court overstepped its authority in ordering it. *See Milliken v. Bradley*, 433 U.S. 267, 282 (1977) ("federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation").

The decision of the district court is AFFIRMED in part and REVERSED in part. The cause is REMANDED with instructions that the injunction be modified consistent with this opinion.

APPENDIX D

March 8, 1989

RE: 08836004

Dr. Philip E. Austin
President
Colorado State University
102 Administrative Bldg.
Fort Collins, Colorado 80523

Dear Dr. Austin:

The Office for Civil Rights (OCR) has completed its review of your progress report and the compliance summary received February 16, 1989. This submission indicates that the University has taken specific steps to meet the commitment regarding financial assistance as set out in the Corrective Action Plan.

Specifically, the University is eliminating men's baseball and women's golf and tennis. The resources from the elimination of these sports will be reallocated to women's sports which will allow for: full financial assistance in the remaining women's sports; alteration of the baseball facility for softball which should aid the women's softball team; and appropriate increases in recruiting.

OCR recognizes that the decision regarding the University's commitment to achieve proportionate distribution of student financial assistance was difficult to make. It can, however, be added to the many changes and enhancements evidenced in its intercollegiate program of which the University can be proud. These include:

-- Enhancement of appointments for coaches of women's sports; appointment of assistants to these coaches. The compensation

for these coaches have been increased and are now more competitive with peer positions.

-- Increasing the recruiting base budgets for women's sports.

-- Proportionality has been reached in trade-outs for women's sports.

-- Recruiting activities are governed equally.

-- The Intercollegiate Athletic Department sports information operation services the needs of all sports programs and student athletes.

-- There is equality in the academic tutoring for all student athletes and for the compensation of tutors.

-- The hiring of a central facilities scheduling coordinator and the assignment of a facility scheduling coordinator for each building to resolve scheduling conflicts.

-- The Business Office, training room, equipment room, laundry, sports information, academic counseling, and supply room are jointly operated for men's and women's sports. All have equal access to typewriters, word processors and computer equipment.

In addition, the University has constructed a varsity weight room and hired a full-time strength coach. The facility is open to all varsity student athletes and is scheduled and supervised by the strength coach and two part-time students.

The University continues in its commitment to accommodate the interests and abilities of members of both sexes but informs OCR that it recognizes that the goal as set forth in its Corrective Action Plan is unattainable. In the letter dated February 10, 1989, valid

nondiscriminatory reasons for not meeting the stated goals have been provided. In addition, accomplishments by the University since OCR's review are substantive and adequately address the cited deficiencies.

This office has a genuine respect for the efforts of the University and commends its Title IX Committee and Department of Athletics for the commitment that ultimately achieved compliance with Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 and 1682, and its implementing regulation, 34 CFR Part 106. Because the University continues to demonstrate good faith efforts to increase athletic opportunities for female student athletes, we are terminating our monitoring procedures effective the date of this letter.

We appreciate your efforts and that of your staff in facilitating compliance. If you have any questions, please call me at (303) 844-5695 or your representative may call Mr. Ramon F. Villarreal, Director, Compliance Enforcement Division at (303) 844-2991.

Sincerely,

Gilbert D. Roman, Ed. D.
Regional Director

cc: Mr. Brian Snow
Office for the State University Systems

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NOV 2 1993

No. 93-559

In The

Supreme Court of the United States

October Term, 1993

COLORADO STATE BOARD OF AGRICULTURE, in its capacity as the governing board of the Colorado State University,

Petitioner,

vs.

JENNIFER ROBERTS, JULIE OSBORNE, JANET BRUMBELOW, LAURA BIELAK, SARA STOUT, AMY RECOUPER, JENNIFER JACOBS, MALIA KUENZLI, STACIE STAFFORD, HEATHER NAKASONE, KIM JOHNSON, AIMEE RICE AINSWORTH, and LISA MIZE, in their individual capacities,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* ALABAMA ASSOCIATION OF SCHOOL BOARDS AND BIRMINGHAM PUBLIC SCHOOLS IN SUPPORT OF PETITIONER

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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

MOTION OF THE ALABAMA ASSOCIATION OF SCHOOL BOARDS AND BIRMINGHAM PUBLIC SCHOOLS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The Alabama Association of School Boards ("AASB") and the Birmingham Public Schools ("District"),

a member of AASB, hereby move, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the accompanying brief as *amici curiae* in support of petitioner. Petitioner's counsel have consented to the filing of this brief and consent of respondents' counsel has been requested but was denied.

The member school boards of AASB and the District are subject to Title IX of the Education Amendments of 1972 as amended, 20 U.S.C. § 1681. The AASB and District are comprised of schools which are representative of the thousands of kindergarten through twelfth grade schools throughout the United States and can demonstrate to the Court the effect that the legal standards announced by the court below may have on millions of students.

The movants seek to raise important matters not fully addressed by the parties concerning the potential threat to kindergarten through twelfth grade schools by an overreaching application of Title IX of the Education Amendments of 1972 as amended, 20 U.S.C. § 1681 ("Title IX"). Movants believe that the perspective of kindergarten through twelfth grade schools on the issues presented by petitioner will assist the Court in evaluating the national importance of the decision below.

For these reasons, the movants request leave to file this brief as *amici curiae* in support of the petition for a writ of certiorari.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

The Alabama Association of School Boards ("AASB") is an association of local school boards in the State of Alabama which receive federal financial assistance. The Birmingham Public Schools (herein "BPS" or "District"), a member of AASB, is located in the City of Birmingham, Alabama and is subject to Title IX of the Education Amendments of 1972 as amended, 20 U.S.C. § 1681 (herein "Title IX") as the recipient of federal financial assistance and the sponsor of interscholastic athletic teams. The District has ten high schools (grades nine through twelve), twenty middle schools (grades six through eight) and fifty elementary schools (grades kindergarten through five). The District is representative of the thousands of school districts and schools throughout the United States which are subject to Title IX and are affected by its interpretation by federal courts and governmental departments.

Title IX decisions issued by lower courts are in conflict with one another and in conflict with the precedent of this Court and leave this District, and thousands like it, in a state of confusion over what is required to comply with Title IX. BPS has been undergoing a Title IX compliance investigation of its interscholastic athletic programs since 1986. Several AASB members are also undergoing compliance investigations. The Department of Education, Office of Civil Rights (herein "OCR") has seized upon the opinion of the court below and is interpreting it as requiring that the number of participants at each of the District's thirty middle and high schools (judged separately) must substantially reflect the enrollment of boys and girls

in each school. Furthermore, OCR has specifically identified which athletic teams the District must offer at each of its high schools.

The AASB and BPS have a strong commitment to compliance with Title IX in all of its programs, including athletics. Because of their institutional interests in the development of the law at issue here, the AASB and BPS seek leave to participate as *amici curiae* in support of the petitioner in this case. The District is in the unique position of having conducted an OCR-approved survey to determine the level of interests and abilities of each student in its high schools and thus, it will serve as the representative member of AASB in demonstrating the untenable ramifications of the lower court's interpretation of Title IX on school districts across the country.

ARGUMENT

I. THE IMPORTANCE OF INTERSCHOLASTIC ATHLETICS IN THE COMMUNITY AND THE DEVELOPMENT OF BOYS AND GIRLS.

Many forces serve to shape children on their journey to adulthood. Academic study and parental direction are both crucial in human development. However, interaction with one's peers plays a significant role as well. Athletics, and extracurricular activities in general, serve to provide children with the tools necessary to be successful and responsible adults.

Adolescents are going through a stage of human development where their identity and self-image shift

from the family-centered existence of childhood to the society-centered existence of adulthood. During this transition period, they need to identify with others to learn that they are normal and have a place in society with their peers. This is met by identifying with a group. Group identification can be achieved through sports, cheerleading, band, drama clubs, *et. cetera*, or through gangs and other unhealthy groupings.

Participation in an athletic program compels young people to learn time management, develop a "work ethic" and instills discipline. Athletic competition allows young people to experience and survive the pain of defeat and the joy of victory while still in the nurturing and learning environment of their schools and families.

This competition further serves to anchor young people to a societal framework, giving them a sense of belonging that is especially crucial in the teenage years. By rewarding good faith effort, it yields a sense of accomplishment and self-worth. Without the strong sense of self-esteem that athletic competition can provide, many young people fall prey to the harmful distractions that surround them every day. In addition, many young people find healthy role models during their experiences in athletic competition.

Athletic competition also provides an important interaction between a school and its surrounding community. In giving schools a more visible place within the community, athletic competition creates a greater incentive for the community to maintain its schools. A greater sense of cohesiveness can be generated between a school

and its surrounding community with the increased parental involvement that athletic competition can foster. Indeed, a greater sense of cohesiveness can be generated within the community itself through competition between schools and interaction between families and neighbors. Athletic competition also provides entertainment opportunities for families within the community. And of course, every community benefits when America's schools produce strong, well-rounded individuals to assume a place in society. *See generally*, Yaffe, *High School Athletics: A Colorado Story*, PHI DELTA KAPPAN, November, 1992, at 177-181.

II. THE CONFLICTING OPINIONS OF THE LOWER COURTS LEAVE THE COUNTRY'S THOUSANDS OF K-12 SCHOOL DISTRICTS IN A CONFUSED STATE AS TO THE OBLIGATIONS OF TITLE IX.

These *amici curiae* submit to the Court that the issues raised in the petition are not limited to intercollegiate athletics but will affect every school in the United States which receives federal funds.

The District is subject to Title IX, as is virtually every public school in the United States which receives federal financial assistance.[1] Failure to comply with Title IX can subject the schools to monetary damages, resulting from a private lawsuit filed by a student, parent or coach, or to the revocation of federal funds upon which schools have

[1] Schools receive federal funding for various vital programs including remedial education, handicap education, school lunch programs, school breakfast programs, R.O.T.C. and job training.

come to rely for survival. *See Franklin v. Gwinnett County Public Schools*, 991 U.S. 899, 112 S.Ct. 1028 (1992).

The District is a relatively poor inner city school system which struggles to provide the best possible educational experience for the over forty-two thousand students that it is required by law to educate. In 1992, for example, budgetary problems caused by a chronic lack of funding from the state government resulting in two years of back-to-back proration of the state's education budget, forced the District to terminate one hundred twelve teacher's aides in the school system including the elimination of entire categories of aides.

Since February of 1986, the District has been under a compliance investigation by the OCR. In 1992, the District conducted a survey of every ninth through eleventh grade student in nine of its ten high schools.[2] The survey instrument was approved by OCR prior to its administration. After analysis of the survey results, OCR issued an order to the District requiring that it add up to 50 additional girls athletic teams at the nine high schools found in violation of Title IX. OCR is also seeking to require administration of a survey at each of the twenty middle schools in order to determine which sports it will require to be offered at each of these middle schools. OCR seeks parity in actual participation rates at every school, in

---

[2] OCR found in 1992 that nine of the District's ten high schools are not in compliance with Title IX. The District agreed to conduct a survey of the interests and abilities of its students in the nine high schools which were not found to be in compliance.

spite of statistical proof that OCR required to be developed which clearly shows that boys at a given school have a much greater interest in participation in interscholastic athletics than girls.

Application of the legal standard announced in the court below in almost every school in America could change the face of education in this country in a way the drafters of Title IX never intended. Adoption of any interpretation of Title IX which would require schools to achieve substantial parity based on sex in the rates of participation in interscholastic sports could result in the total elimination of athletic programs, or, in the very least, place an additional strain on the scarce education dollars available and create an expensive and bureaucratic nightmare for thousands of dedicated public educators, students, and taxpayers.

The OCR has indicated to the District that it is relying on the decision below as well as the First Circuit's recent decision in *Cohen v. Brown University*, 991 F.2d 888 (1st Cir. 1993) as support for its inflexible interpretation of Title IX. The District can demonstrate how the standards established by the decision below will lead to absurd results if applied to schools from grades kindergarten through twelve.

As pointed out in the well-reasoned petition for writ of certiorari submitted on behalf of Colorado State University, the opinion below allows the micro-management of sports offerings by courts and, as demonstrated by the OCR's treatment of the District, by the Department of Education. The rigid three-prong test for compliance will almost always require application of a rigid statistical test

to determine if the number of boys and girls actually participating in a sport substantially "mirrors" the ratio of boys and girls which attend the school.

Of course, the first prong of the test is one which requires on its face that compliance with Title IX is attained by statistical parity.[3] The second prong requires a "continuing practice of program expansion." The difficulty of proving this "continuing practice of program expansion" is demonstrated by the fact that the court below found that this prong was not satisfied by Colorado State University despite the undisputed evidence that the University had closed its statistical disparity from 15.6% in the late 1980's to 10.5% in the early 1990's. Pet. App. at C-13.[4]

The third prong is the key for any school which lacks statistical parity. The decision of the court below makes it

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[3] The court below adopted the OCR's three prong test. Pet. App. at C-9. The first prong states that compliance can be achieved by determining:

> Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.

The OCR regulations upon which each prong of the test is based do not distinguish between interscholastic and intercollegiate competition. 44 Fed. Reg. at 71,418. OCR applies the same test to K through 12 sports teams as it does to intercollegiate competition.

[4] Title IX's provisions and regulations did not apply to athletic programs like those of the petitioner and these *amici curiae* until this court's decision in *Grove City v. Bell*, 465 U.S. 555 (1983) was legislatively overturned in 1988. *See* Pub. L. 100-259 § 1; 102 Stat. 28 (codified at 20 U.S.C. §§ 1687-1688).

clear that the third prong, which requires that the interests and abilities of the under-represented sex have been fully and effectively accommodated by the present program, is to be interpreted as requiring that 100 percent of girls' interests and abilities are accommodated in order to attain compliance. Since it is axiomatic that this will rarely occur at a school, the test as a whole really requires that a school must have "substantial proportionality" between athletic participation and enrollment in order to come within what the court below called a "safe harbor" under Title IX. Pet. App. at C-9.

As previously stated, OCR has utilized the inflexible standard adopted by the court below in determining Title IX compliance for every school receiving federal funds which has interscholastic competition. The absurd results of this inflexible approach are clearly demonstrated by the statistical evidence which OCR itself required to be generated in its seven-year-long investigation of the District.

Earlier this year, the financially strapped District, after analyzing interest and abilities statistics obtained from the student survey which the OCR approved, presented a proposal to the OCR which the District believes fully complies with Title IX. However, before explaining the survey results, the Court should understand how the survey instrument was used to measure students' interests and abilities.

THE SURVEY

The BPS' interest and abilities survey asked boys and girls to identify, from a list of thirteen sports, those in

which they would actually participate if they were offered at their school.[5] The survey asked students whether they had participated in interscholastic competition in a sport in the past and, if so, if they would participate in the future. If the student answered yes, the student was considered to be a reasonable prospect to participate in the future. If the student answered that he or she had not participated in interscholastic competition in the past but would like to (and would be willing to practice two hours per day during the week and would be available at night and on the weekends for competition), the student was considered to be a reasonable candidate for actual participation.[6] The number of students responding as indicated above were added together

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[5] The sports listed as choices on the survey were the thirteen sports sanctioned and regulated by the Alabama High School Athletic Association ("AHSAA") (i.e., football, basketball, baseball, softball, soccer, track, volleyball, cross country, swimming, gymnastics, wrestling, golf and tennis). All states have a similar organization which promulgates rules governing eligibility, starting and ending dates of practice and competitive seasons, and competitive rules, etc. The intercollegiate counterpart to the AHSAA and similar organizations is the National Collegiate Athletic Association ("NCAA").

[6] The District's Athletic Director conducted an informal telephone survey of Birmingham, Alabama area athletic directors and coaches which yielded a consensus opinion that a student must be willing to practice two hours a day (five days per week) and be available at night and on weekends for competition in order to be considered a reasonable prospect for actual participation because this would be the minimum commitment needed from the student athlete. OCR has implicitly recognized the reasonableness of these criteria.

to determine the total number of boys and girls expressing "sufficient" interest in a given sport to be considered a reasonable prospect for actual participation.[7]

The District's analysis of the survey did not attempt to eliminate students who may have sufficient interest but who lack the "ability" to compete at the high school level because interviews of the District's students and employees revealed that students are almost never "cut" from a team for lack of athletic ability.

Most of the high schools surveyed have about the same number of girls and boys. Without exception, the survey results showed that boys have a proportionately greater interest in participating in interscholastic sports than do girls.

THE DISTRICT'S PROPOSAL TO OCR

The District proposed to OCR that it would utilize the survey results in such a way as to provide substantially equal accommodation of the interest expressed in the survey. In the nine high schools, this would result in

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[7] At the intercollegiate level, as in *Brown University*, 991 F.2d 888, 900 (1st Cir. 1993), women often argue that the institution should not be allowed to defend a claim based on the fact that women have proportionately less interest than men because the institution has the ability to shape the relative levels of interest in its student population by the levels of scholarships offered and other recruiting techniques. Whatever merit exists in this argument relative to intercollegiate athletics, it has no application in K-12 programs as the schools do not recruit students but merely accept whomever happens to live in that district.

adding a total of six new girls sports teams and an unspecified number of junior varsity teams for existing sports at a school. For example, if thirty boys sign up to play basketball and a boy's junior varsity team is started, and a similar number of girls sign up to play basketball, a junior varsity team will be added for girls.

An example of this approach is Parker High School (herein "Parker") which has a total enrollment of 999 students, with a substantially equal division between boys and girls. A chart reflecting Parker's survey results is at Appendix A. At Parker, 207 girls and 398 boys expressed interest in the thirteen sports (i.e. girls expressed 34% of the total while boys expressed 66%).

The District proposed to OCR that it would comply with Title IX by continuing to offer football, basketball (varsity and junior varsity), baseball, and track for boys, and basketball, softball and track for girls. In addition, the District proposed *adding* a girls volleyball team (including a junior varsity team if enough girls came out for the sport) and adding a junior varsity girls basketball team. In all, the District offered to add three new teams or sports for girls at Parker. These sports offerings would result in accommodating 214 boys and 122 girls for a total of 336 students (assuming that they all actually participated). Of the total number of interested students accommodated (i.e., 336), 64% would be boys and 36% would be girls. This would result in leaving 46% of the boys who are potential participants unaccommodated and only 40% of the girls who are potential participants unaccommodated (e.g., of the 398 potential male participants in sports, only 214, or 54%, would be accommodated).

The proposal outlined above would undoubtedly result in accommodating the same proportion of boys and girls interested in participation. It would, however, probably result in a greater number of boys actually participating in sports than girls due solely to the fact that boys at Parker have twice the relative interest of girls.

The method proposed by the District to OCR was implicitly rejected by the court below and explicitly rejected by the First Circuit in *Brown University*, 991 F.2d at 899, – and rejected by OCR based on those cases. *See* OCR Letter to the District at Appendix B, hereto.

Like the court below and the *Brown University* court, OCR applies a standard requiring parity in actual participation rates or the accommodation of all interested females in order to comply with Title IX.

The practical effect of the holding below is that every school in this country can achieve compliance only by either:

1. Showing an actual numerical parity in the participation of boys and girls; or
2. Showing that the interest of every girl has been accommodated by offering them a spot on an athletic team of their choosing.

For example, as Parker has been told by the OCR since it has not achieved numerical parity (and will not under the District's proposal) it must offer eleven new girls' teams or sports, including the possibility of offering swimming and gymnastics, despite the fact that the school has no swimming pools and has no suitable gymnastics equipment for an interscholastic level team. *See*, Appendix B.

Under the test of the court below, if boys at Parker are allowed to continue to play basketball, junior varsity basketball, track, baseball and football, 184 boys who want to compete in interscholastic athletics would be left unaccommodated by those offerings. On the other hand, all girls who want to participate in interscholastic athletics will have the opportunity to do so, with the exception of two girls who want a soccer team.[8] The drafters of Title IX could not have intended such an absurd and unfair result. Accommodating 99.5% of the girls and only 54% of the boys at Parker High School in Birmingham, Alabama is what the decision below would require and it is what the federal government is ordering the District to do.

If this result is not sufficiently horrifying, look at a few examples of what the OCR says the substantial parity rule would require at middle schools. In the 1989-90 academic year, the middle schools were allowed to field teams that would play from one game to a few times a year in boys *and* girls basketball, cross-country, volleyball, track and gymnastics.[9] Middle school programs are very informal and rely solely on volunteers to coach and upon whether the school has the funds and facilities to participate.

---

[8] The District has allowed girls to play on boys teams for years and has actually had several to do so. Hence, if the one girl who indicated in the survey that she wanted to play football and the four girls who did the same for baseball actually signed up to play, they would be accommodated. The one girl interested in wrestling would not be accommodated because the District has no boys wrestling teams. *See* Appendix A.

[9] Gymnastics events at this level would only involve simple tumbling activities.

Pursuant to the District investigation, OCR found that Daniel Payne Middle School was in violation of Title IX. At that school, individuals volunteered to "coach" only boys and girls basketball, gymnastics and cross country. Students were then asked to sign up if they wanted to play. Because no students wanted to run cross-country, it was not offered. Twelve boys played basketball and one girl participated in gymnastics. An insufficient number of girls signed up for basketball to field a team. Pointing out that Daniel Payne's enrollment of 419 children was about 50% boys (208) and 50% girls (211), and that 92% (or 12) of the "athletes" were boys and only 8% (or 1) were girls, the OCR found by a letter dated January 14, 1993 that "the interests and abilities of boys and girls were not being equally effectively accommodated . . . . " Under the substantial parity test, since only one girl could participate in what was offered, only about one boy could participate. Since basketball teams require that at least five boys play, Daniel Payne could comply only by either not allowing any boys to play or by not allowing any students to play.

W. J. Christian Middle School was also found in violation of the substantial parity test. It has 238 students – 94 boys (39%) and 144 girls (61%). Of 29 participating "athletes", 57% were boys (i.e., 15) and 43% (i.e., 14) were girls. Under the parity test, because girls comprise 61% of the student population, they should have represented close to 61% of the total student athletes. Assuming 15 boys participated, room should have been made for nine additional girls to achieve parity. Or, assuming that only enough coaches volunteered to coach girls sports to accommodate 14 girls, only nine boys should have been

allowed to play. Under the parity test, the principal of W. J. Christian violated Title IX – despite offering basketball and gymnastics for boys and volleyball and gymnastics for girls. This determination was based upon OCR's finding that "the principal decided not to offer track because it coincided with the gymnastics season." Since the court below and OCR allow proof of discrimination by statistics *alone*, the District cannot present the above-referenced decision of the principal at W. J. Christian Middle School as a sex-neutral reason for the numerical disparity. As a result, the District could either lose its federal funding or face the threat of monetary damages and injunctive relief in a suit brought by a private plaintiff.

The test applied by the court below, as illustrated by the above examples, would not comply with this Court's decision in *Mayor of City of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620-21 (1974). Allowing proof of discrimination by the use of the statistical proof alone finds no anchor in the precedent of this Court. The statistical parity test would lead to results in the above examples which clearly show that use of statistics alone is often "meaningless". *Id.* School districts across the country urgently need guidance in the meaning of Title IX which can only come from this Court.

III. THE PRACTICAL CONSEQUENCES OF THE APPLICATION OF THE SUBSTANTIAL PARITY TEST TO EDUCATIONAL INSTITUTIONS AT THE K-12 LEVEL.

If the Tenth Circuit's interpretation of Title IX is allowed to stand and becomes the standard for all schools

which fall under its application, the practical consequences in complying with it will be that students who are unfortunate enough to live in a poorer area, such as a rural or inner city school district, will be disproportionately affected. This result will affect both girls and boys alike. While budgeting at the higher education level might not be the most important factor to be considered in extracurricular activity decisions, it is a stark reality at the K-12 level. The test propounded by the Tenth Circuit would take away a school administrator's power to provide opportunities that are fair to both sexes given limited economic resources, and this inability of school administrators to make equitable decisions concerning school athletics will have its greatest impact in poorer school districts. Schools in poorer districts which lack sufficient funds to add the new sports required by the Tenth Circuit's interpretation will have to make tough decisions about the opportunities, if any, they will provide in the future.

Alabama courts have recently held that the state has a constitutional duty to educate all the young people of the state "regardless of the wealth of the communities in which the school children reside" and has ordered reform. *Opinion of the Justices, 338,* ___ Ala. ___, 1993 WL 134710 (Ala., April 27, 1993). The District has a history of proration and, as previously noted, has recently been forced to terminate one hundred twelve teacher's aides. For systems like the District, one of three choices will have to be made in order to comply with the Tenth Circuit's interpretation of Title IX: (1) stop providing any athletic opportunities for students; (2) eliminate some of

the interscholastic athletic opportunities currently provided for boys; or (3) reduce the financial resources dedicated to academic programs which are already underfunded and/or raise taxes on state and local citizens.

In poor districts that are forced to eliminate interscholastic athletic opportunities, the likely result will be that both boys *and* girls will have less opportunities available to them. However, the effect on girls will probably be much greater. Many of the same private community organizations which currently offer athletic opportunities to young people will be expected to fill in the void (especially in more affluent areas). However, it is likely that these groups would concentrate on providing opportunities in the revenue self-sustaining sports of boys football and basketball. Hence, while boys would see their opportunities diminish, it is probable that girls would receive even less.

Where private sources fill in the gaps created by local schools, young people will be competing in a non-regulated environment. Where schools provide the athletic programs, practice times are regulated to keep athletics from interfering with academics and students are required to undergo physical examinations prior to participation to ensure that they are able to compete safely. Transportation to and from competitions is also regulated and supervised by the schools. Where private sources provide these opportunities, the only regulation and supervision will be on a self-imposed and an *ad hoc* basis.

Where a school is forced to cut back on boys athletic programs to comply with Title IX, the first ones to go will be the non-revenue producing sports, such as golf, tennis,

cross-country, soccer, and track. Unfortunately, because these sports can sometimes be coached by the same person for boys and girls, boys will be told that they cannot participate but that girls can. If schools are forced to comply with the new three-prong test of the Tenth Circuit, situations will exist where opportunities are offered to girls but not to boys solely for Title IX compliance reasons despite having the available interest, coaches, and facilities. For example, at Parker High School, girls will be allowed to participate in tennis, golf, cross-country and, possibly, swimming, while the boys who could participate will not be allowed to do so.

In short, equally accommodating the interests in athletics of both boys and girls is a very complicated task, especially at the K-12 level where economics and funding, not to mention political and parental pressure, play such a large role in the decision-making process. This problem cannot be solved by looking at statistics alone without creating a whole new set of inequities. Guidelines are needed which would allow school officials to make equitable decisions based on the limited economic resources available.

In instances where schools are forced to make the unfortunate decision to eliminate all interscholastic athletics because they lack sufficient economic means to comply with the "effective accommodation" test, boys and girls who participate in auxiliaries, such as pep clubs, marching bands and cheerleader squads, which revolve around certain sports, will have their interests go unaccommodated as well. These auxiliaries provide many of the same benefits in the development of young boys and girls that the actual participants in athletic competition

receive. Where the sports which support these auxiliaries are eliminated, these auxiliaries will no longer be needed, and the interests of the former participants will go unaccommodated. It would be very condescending indeed to not appreciate these important interests when considering the application of a new Title IX standard.

IV. USING A STATISTICAL DISPARITY TO SHOW A TITLE IX VIOLATION TAKES TOO NARROW OF AN APPROACH AT THE K-12 LEVEL OF EDUCATION.

According to the Tenth Circuit, a statistical disparity between boys and girls is conclusive and irrebuttable proof of a Title IX violation unless the educational institution can show continual expansion of programs for the under-represented gender, or unless it fully and effectively accommodates the interests and abilities of that gender. Pet. App., C-9. If statistical disparities alone are to be used to show violations of Title IX, the entire spectrum of extracurricular activities offered by an educational institution should be examined, instead of merely one portion of those activities, i.e., athletics. When a magnifying glass is placed over one portion of a school's extracurricular offerings and a violation is declared based solely on a statistical disparity, the efforts of school officials to accommodate the interests of all students, both academic and athletic, are ignored. It also wrongfully assumes that boys and girls, at any particular age, are interested to the same extent in athletics and that any particular school has sufficient funds available to offer enough athletic programs to fully accommodate the interests of both genders in athletic competition. The

equitable allocation of resources to boys and girls athletics is not something which should be examined in a vacuum. If statistical disparity is to be the standard, then the examination should focus on the entire spectrum of extracurricular opportunities available and not just on one portion of those opportunities.

CONCLUSION

The issues which petitioner has asked this Court to review are not limited to intercollegiate athletics. Indeed, confusion surrounding the Title IX issues raised by the petitioner will have greater impact on the kindergarten through twelfth grade schools across the country. The *amici curiae* strongly urge this Court to grant the petition for *writ of certiorari*.

Respectfully submitted,

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Counsel for Amici Curiae

*Counsel of Record
November 3, 1993

APPENDIX A

PARKER HIGH SCHOOL

	A NO. PAST/ CURRENT AND TO CONTINUE	B NO. WHO HAVE NOT PARTICIPATED BUT WILL[1]	C TOTL. WITH SUFFICIENT INTEREST	D CURRENTLY OFFERED	E PROCEED TOWARD OFFERING
GIRLS:					
FOOTBALL	0	1	1	NO	NO
BASKETBALL	30	6	36	YES	YES
BASEBALL	5	2	7	YES	NO
SOFTBALL	11	11	22	NO	YES
SOCCER	1	1	2	NO	NO
TRACK	21	3	24	YES	YES
VOLLEYBALL	27	13	40	NO	YES
CROSS-COUNT	9	1	10	NO	NO
SWIMMING	16	8	24	NO	NO
GYMNASTICS	7	11	18	NO	NO
WRESTLING	0	1	1	NO	NO
GOLF	1	3	4	NO	NO
TENNIS	11	7	18	NO	NO
TOT. GIRLS:	N/A	N/A	207[3] (34%)		

BOYS:					
FOOTBALL	57	18	75	YES	YES
BASKETBALL	37	18	55	YES	YES
BASEBALL	8	12	20	YES	YES
SOFTBALL	1	3	4	NO	NO
SOCCER	1	6	7	NO	NO
TRACK	54	10	64	YES	YES
VOLLEYBALL	15	11	26	NO	NO
CROSS-COUNT	19	10	29	NO	NO
SWIMMING	23	13	36	NO	NO
GYMNASTICS	10	8	18	NO	NO
WRESTLING	10	13	23	NO	NO
Ggolf	6	14	20	NO	NO
TENNIS	7	14	21	NO	NO
TOT. BOYS:	N/A	N/A	398[2] (66%)		

PROPOSED OFFERINGS:	# ACCOM-MODATED	% OF TOTAL INTERST ACCOM-MODATED[4]	% TOTAL INTER-EST[2,3]	# ENROLLED	PERCENT ACCOMMO-DATED[5]
BOYS					
FOOTBALL	75				
BASKETBALL	55				
BASEBALL	20				
TRACK	64				
TOTAL	214	64%	66%	50%	54%
GIRLS					
BASKETBALL	36				
SOFTBALL	22				
TRACK	24				
VOLLEYBALL	40				
TOTAL:	122	36%	34%	50%	60%

App. 3

[1] Based on those students who said they would be available to participate five days a week for two hours or more and that they would be available on weekends.

[2] Total interest among boys.

[3] Total interest among girls.

[4] Percentages represent the proportion of boys and girls whose interests would be met by the proposed offering. I.e., a total of the interest of boys and girls (398 + 207) is 605 - 64% boys and 36% girls.

[5] Percentages represent the total number of one sex who would be accommodated by the proposed offerings by the total number of one sex expressing sufficient interest in all sports. For example, boys express a total interest of 398 and the proposed offerings will accommodate 214 males (i.e., 1 - (214/398) = 54%).

APPENDIX B

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
REGION IV
POST OFFICE BOX 2048
ATLANTA, GEORGIA 30301

October 22, 1993

Mr. Thomas F. Campbell
Attorney
Lange, Simpson, Robinson, and Somerville
1700 First Alabama Bank Building
417 Twentieth Street, North
Birmingham, Alabama 34203

Dear Mr. Campbell:

Re: Complaint #04-85-1229

The office for Civil Rights (OCR) received your letters dated June 22, 1993, July 19, 1993, and August 10, 1993. These letters provided information concerning actions taken by Birmingham City School District (District) to correct violations of Title IX of the Education Amendments of 1972 (Title IX), as amended, 20 U.S.C. Sections 1681 *et seq.*, and its implementing regulation at 34 C.F.R. Part 106.

On January 14, 1993, OCR issued a Letter of Findings (LOF) in which the District was found to be in violation of Title IX at 34 C.F.R. Section 106.41(c)(1) because it failed to fully accommodate the interests and abilities of its female students. Additionally, the District was found in violation of the regulation at 34 C.F.R. Section 106.41(c)(3) and (c)(7) because of inequities in scheduling

of practice times and the provision of locker rooms, practice, and competitive facilities.

As part of the corrective action plan, the District agreed to remedy the violations and submit a copy of the Athletic Interest Survey within 30 days of the Letter of Findings (LOF). The District provided OCR a copy of the Survey on October 6, 1992, prior to the issuance of the LOF. On October 22, 1992, OCR notified the District that the Survey format was acceptable. The District also agreed to conduct a survey of interests and abilities at seven middle schools and all high schools, except Phillips, within 60 days of the date of the LOF. Where interest is expressed, if enough students to field a team followup the expressions of interest by trying out for the team and the sport is a spring sport, it will be offered in the Spring of 1994. On January 4, 1993, OCR received a copy of the raw data results of the interest and ability survey and was informed that a copy of the analysis of the data would be received by January 20, 1993.

On April 30, 1993, OCR requested that the District submit copies of the schedules for the Fall 1992 sports at the high schools and middle schools. We have since discovered that a typographical error was made in the LOF issued on January 14, 1993. Item 3 of the conclusion on page 31 should have a due date of May 31, 1994 for the 1993-94 winter and spring sports.

Fall sports for the 1993-94 school year are still to be reported by December 31, 1993. We apologize for any inconvenience our error may have caused you.

On June 22, 1993, OCR received the District's analysis of the interest and ability survey. A review of the information indicates that 6 girls' sports have been added to the 9 high schools surveyed since the 1989-90 school year. In addition, 10 girls' sports and 4 boys' sports have been dropped at the 9 high schools since the 1989-90 school year. A review of the survey indicates that there is sufficient interest by enough girls at the following high schools to field a team in the following sports.

High School	Sport(s) to be offered to girls
Carver	Volleyball Ensley Tennis, JV and possibly Freshman Basketball
Huffman	Soccer, Track, Tennis, JV and possibly Freshman Basketball
Jackson-Olin	Softball, Track, Volleyball, JV Basketball
Parker	Softball, Track, Cross Country, JV Basketball
Ramsey	Softball, Track, Tennis, JV Basketball
Wenonah	Softball, Volleyball, JV Basketball
West End	Tennis, Cross Country, JV and possibly Freshman Basketball
Woodlawn	Cross Country, Tennis, JV and possibly Freshman Basketball

The above sports that are spring sports are to be offered in the spring of 1994. All fall and winter sports are to be offered in the 1994-95 school year. In order for OCR to monitor the District's fulfillment of this issue of the corrective action plan, the District will provide OCR with the girls' spring sports that are added at the above high schools by May 31, 1994. The fall and winter girls' sports

that are added are to be reported by December 31, 1994. Squad lists are also to be submitted for each sport that is added. The survey also indicates interest by girls in swimming and gymnastics. This will be the subject of a further review by the District.

We remind you that we have not received your analysis of the survey conducted at the middle schools. This should be submitted within 15 days of the date of this letter. Upon receipt of this information, an evaluation will be made regarding the District's compliance on this issue.

As part of the corrective action plan, the District agreed to provide a copy of Phillips High School's practice schedule for boys' and girls' basketball teams' rotation of the use of the gyms and locker rooms. In your letter dated August 20, 1993, you provided OCR with a copy of a memorandum from the principal of Phillips High School stating that the girls' basketball team practiced by their choice in the facility in the main building. The District must rotate use of the gyms and locker rooms at the high school between the boys' and girls' basketball teams to meet the requirements of the corrective action plan. A statement from the District stating that this rotation has been put into effect, should be submitted within 15 days of this letter. Upon receipt of this information, an evaluation will be made regarding the District's compliance on this issue.

As part of the corrective action plan, the District agreed to provide OCR with copies of the boys' and girls' basketball practice schedules for all high schools except Carver, Ensley and Wenonah. The District provided these schedules to OCR in a letter dated September 29, 1992. On

April 30, 1993, OCR notified the District that based on a review of the practice schedules, the boys' and girls' basketball teams at Ramsey High School meet the requirements of the corrective action plan on this issue. Additional information was requested on the remaining high schools so that OCR could make an evaluation. Carver High School was included in this request because a review of their schedule indicated that practice times were not being rotated between the boys' and girls' basketball teams.

In letters dated June 22, 1993 and August 10, 1993, the District provided OCR with the requested information. A review of these basketball practice schedules indicates that the boys' and girls' basketball teams at Woodlawn, West End, and Parker High Schools are practicing the equivalent amount of time and their regular season and out of season practice is also equivalent and, therefore, these schools now meet the requirements of the corrective action plan on this issue. Jackson-Olin High School's boys' basketball team practices 35 minutes per day more than the girls' basketball team. In addition, the boys' team has a spring practice. There is no spring practice for the girls' team. Phillips High School's boys' basketball team practices in the early time slot for three weeks, in contrast to the girls' practicing one week in the early time slot. Carver High School's boys' basketball team always practices in the early time slot and does not rotate with the girls' team.

The following action must be taken at these schools before an evaluation can be made regarding compliance with the corrective action plan on this issue. Jackson-Olin High School must increase the girls' basketball teams

practice time to equal the boys' basketball team's practice time and provide the girls' team with a spring practice. Phillips and Carver High Schools must rotate the early practice time equally between the boys' and girls' basketball teams. OCR is unable to evaluate Huffman High School's practice schedule because some of the practice days do not indicate specific beginning and ending times of practice. The District should submit the specific times of practice for boys' and girls' basketball practice at Huffman High School and a statement that the requested actions have been taken at Jackson-Olin, Phillips, and Carver High Schools within 15 days of the date of this letter. Upon receipt of this information and evaluation will be made regarding the District's compliance on this issue.

We remind you that failure to take all the corrective actions agreed upon will subject the District to a referral for enforcement due to noncompliance with Title IX.

This letter is not intended nor should it be construed to cover any other issues regarding compliance with Title IX that may exist and are not discussed herein. Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personal information which, if released, could constitute an unwarranted invasion of privacy.

Thank you for your cooperation. If you have any questions or comments, please contact Mr. Louis O. Bryson,

Sr., Director, Postsecondary Education Division, at 404/331-2806.

Sincerely,

Louis O. Bryson, Sr.
for

Archie B. Meyer, Sr.
Regional Civil Rights Director

cc: Chief State School Officer

MOTION FILED
NOV - 3 1993

No. 93-559

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

COLORADO STATE BOARD OF AGRICULTURE,
in its capacity as the governing board
of the Colorado State University,
Petitioner,

v.

JENNIFER ROBERTS, JULIE OSBORNE, JANET BRUMBELOW,
LAURA BIELAK, SARA STOUT, AMY RECOUPER,
JENNIFER JACOBS, MALIA KUENZLI, STACIE STAFFORD,
HEATHER NAKASONE, KIM JOHNSON,
AIMEE RICE AINSWORTH, and LISA MIZE,
in their individual capacities,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN COUNCIL ON EDUCATION, THE ATLANTIC COAST CONFERENCE, ARIZONA STATE UNIVERSITY, THE BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, THE COLLEGE FOOTBALL ASSOCIATION, SOUTHERN METHODIST UNIVERSITY, THE UNIVERSITY OF NEBRASKA-LINCOLN, THE UNIVERSITY OF NOTRE DAME, THE WESTERN ATHLETIC CONFERENCE, AND THE NATIONAL WRESTLING COACHES ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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November 3, 1993

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-550

COLORADO STATE BOARD OF AGRICULTURE,
in its capacity as the governing board
of the Colorado State University,
Petitioner,

v.

JENNIFER ROBERTS, JULIE OSBORNE, JANET BRUMBELOW,
LAURA BIELAK, SARA STOUT, AMY RECOUPER,
JENNIFER JACOBS, MALIA KUENZLI, STACIE STAFFORD,
HEATHER NAKASONE, KIM JOHNSON,
AIMEE RICE AINSWORTH, and LISA MIZE,
in their individual capacities,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37.2, *amici* respectfully move for leave to file the attached brief *amici curiae* in support of petitioner. Petitioner has consented to the filing of this brief; its letter of consent has been sent to the Clerk. Respondents have refused consent.

The following *amici*—national associations, regional athletic conferences and individual colleges and universities—have a compelling interest in the legal issues presented by this case. These *amici* are fully committed to equal opportunity in university programs and to expansion of women's programs in those areas where women have traditionally been underrepresented. They are gravely concerned, however, with the confusion surrounding Title IX and with the legal issues presented by this case.

1. The American Council on Education ("ACE") is a non-profit national educational association founded in 1918 whose members include more than 1,700 public and private colleges, universities, and educational organizations throughout the United States. As a leading participant in higher educational affairs, ACE's purpose is to promote the interests of all members of the academic community: students, faculty and administration. ACE participates as an *amicus curiae* only on rare occasions when a case, such as this one, presents issues of significant importance to higher education in the United States.

2. Arizona State University ("ASU") is a constitutionally-created body corporate of the State of Arizona governed by the Arizona Board of Regents. The University is a fully accredited bachelor, master and doctoral degree-granting institution located in Tempe, Arizona, with a West Campus in Phoenix, Arizona, and with an enrollment of more than 45,000 students. ASU is an institution dedicated to providing outstanding programs in instruction, research, and service to the state and the nation. ASU considers intercollegiate athletics to be an integral part of the university. It is the policy of ASU to provide equal opportunity through affirmative action in employment and educational programs and activities, including its intercollegiate programs, and discrimination is prohibited on, among other grounds, the basis of sex. ASU urges this Court's grant of *certiorari* and seeks resolution of the existing conflict among the federal circuits.

3. The Atlantic Coast Conference is an intercollegiate athletic organization founded in 1953. The Conference is committed to providing opportunities as required by law for participation in competition, administration and governance in intercollegiate athletics in a spirit of fairness for all. The Conference believes that the liability and remedial issues presented by this case are of vital importance to all schools subject to Title IX.

4. The Board of Governors of the University of North Carolina, known as the University of North Carolina and

located in Chapel Hill, is the governing authority for higher education in the State of North Carolina. The University of North Carolina is composed of sixteen constituent institutions with a total enrollment of approximately 141,884 students. Fifteen of the sixteen constituent institutions field a total of 215 intercollegiate athletic teams. Approximately 4,200 students participate on these teams. In light of these facts, the University of North Carolina has a compelling interest in an authoritative determination of its obligations under Title IX, the standards to be applied in determining whether it has met those obligations, and the remedies which might be enforced against it for alleged violation of those obligations.

5. The College Football Association ("CFA") is comprised of 67 institutions that sponsor intercollegiate football at the most competitive level (Division I-A) within the National Collegiate Athletic Association ("NCAA"). In addition, all CFA members sponsor a variety of other sports for men and women and are subject to Title IX. It is the objective of CFA and its members to demonstrate that sponsorship of quality intercollegiate athletic programs is consistent with the overall objectives of the universities involved. The issues presented in this case are of significant importance to the future of college sports and to all universities that sponsor an intercollegiate athletic program.

6. Southern Methodist University ("SMU") is a private non-profit educational institution located in Dallas, Texas, dedicated to academic excellence through its undergraduate and graduate programs. With more than 5400 undergraduate students, SMU sponsors a number of intercollegiate sports teams for men and women competing at the NCAA Division I-A level. By joining in this *amicus* brief, SMU seeks this Court's enunciation of the standard of compliance with Title IX. SMU also seeks to allow educational institutions, if found to be in violation of Title IX, to determine how to allocate their limited resources consistent with the requirements of Title IX before a court imposes a plan for compliance.

7. The University of Nebraska-Lincoln is a public, tax-supported institution located in Lincoln, Nebraska. With more than 15,000 undergraduate students, the university sponsors a number of men's and women's intercollegiate athletic teams competing at the NCAA Division I-A level. The University of Nebraska-Lincoln joins the other *amici* in seeking review of the important liability and remedial issues raised in the decision below.

8. The University of Notre Dame, ("Notre Dame") is a Catholic University founded in 1842 by the Congregation of Holy Cross. Notre Dame presently enrolls 10,123 students. Striving for excellence both in the classroom and on the playing field, Notre Dame competes at the NCAA Division I-A level, fielding numerous men's and women's intercollegiate teams competing in many different sports. Norte Dame is firmly committed to providing equal opportunity to all of its students and faculty. Without joining all of the specific arguments contained in the *amicus* brief, Notre Dame joins the other *amici* in urging this Court to accept *certiorari* in this case because the questions presented about the application of Title IX principles are of paramount importance to Notre Dame and to every institution seeking to provide equal opportunities to its students.

9. The Western Athletic Conference ("WAC") is an intercollegiate athletic organization made up of the following member institutions: Air Force Academy, Brigham Young University, Colorado State University, Fresno State University, San Diego State University, University of Hawaii, University of New Mexico, University of Texas El-Paso, University of Utah, and University of Wyoming. The WAC has long been committed to equal opportunity for all student athletes, and many of its member universities have taken the lead in fighting against discrimination in all its forms. Because all members of the WAC are subject to Title IX, the liability and remedial issues presented in this case are of crucial importance.

10. The National Wrestling Coaches Association ("NWCA") represents wrestling coaches at all levels and styles in the United States. Amateur wrestling is probably the world's oldest sport. There are presently 366,165 grade school, high school, college and post-college wrestlers throughout the United States. NWCA is particularly concerned about the confusion in the lower courts as to what liability standard governs Title IX claims. It is also gravely concerned that a liability test based on pure statistical disparity will force university administrators to discriminate solely on the basis of gender in establishing university athletic programs.

These *amici* are in a unique position to aid this Court in determining whether *certiorari* should be granted in this case. Each organization and institution has a compelling interest in resolving the confusion which currently exists in the lower federal courts as to the applicable liability and remedial standards which govern Title IX. Until the confusion is resolved, these *amici*—along with all other institutions of higher learning—cannot ascertain with any confidence whether a particular educational offering meets Title IX's mandates.

The interests of *amici* are direct and substantial. The participation of the *amici* will facilitate the Court's thorough consideration of the issues and will bring important perspectives to bear. Accordingly, *amici* respectfully request that their motion for leave to file an *amici curiae* brief in support of petitioner be granted.

Respectfully submited,

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BRIEF *AMICI CURIAE*

INTEREST OF THE *AMICI CURIAE*

The interests of the *amici curiae* are set out fully in the Motion for Leave to File which accompanies this brief.

SUMMARY OF THE ARGUMENT

The question of what standard governs Title IX liability is the single most compelling issue surrounding Title IX litigation today. Four different courts of appeals have now weighed in on the issue. Other federal courts have established their own liability standards, leaving no less than six distinct, independent standards.

The uncertainty created by these various tests is disastrous for these *amici* and for all educational institutions charged with Title IX compliance. The liability standard here means everything, because without a defined test educational institutions can never ascertain with any certainty whether offerings in a particular academic area are in compliance with Title IX.

Even if there were no conflict in liability standards, this case would nevertheless merit review because of the unprecedented and extraordinary disparate impact test adopted by the court below. Stripped to its essentials, this test relies upon a pure statistical disparity analysis, requiring that an educational institution meet "statistical proportionality" standards regardless of the interests and abilities of its student body, and regardless of the numerous other factors which may impact upon the creation and maintenance of athletic programs. As such, the standard forces educational institutions to restructure their program offerings solely on the basis of gender, the very evil prohibited by Title IX.

Finally, the remedial scheme adopted by the court below has serious ramifications for all educational institutions. No longer willing to afford institutions of higher learning the discretion to solve discrimination problems,

the remedial scheme takes the unprecedented step of ordering a university to establish and maintain a particular athletic program even though the purported Title IX violation could be solved by other, less intrusive methods.

ARGUMENT

I. THE HOLDING OF THE COURT BELOW CONFLICTS WITH THE DECISIONS OF NUMEROUS LOWER FEDERAL COURTS AND INTENSIFIES THE WIDE-SPREAD CONFUSION ABOUT WHAT STANDARD SHOULD GOVERN TITLE IX CLAIMS.

After comparing the lower court's holding with the holdings of *Guardians, Cannon,* and *Cohen*,[1] one cannot seriously dispute the existence of a square conflict as to what liability standard should govern Title IX claims. The petition for certiorari contains a complete discussion of the contradictory standards established in these cases, Pet. at 13-20, a discussion which will not be repeated here except to note that the conflict among the circuits and the clash with this Court's own rulings are alone sufficient and strong reasons for granting the petition.

The illumination of the contradictory standards adopted by the First, Seventh, and Tenth Circuits, however, exposes only the tip of the controversy and confusion surrounding Title IX. Without doubt, the single most compelling uncertainty surrounding Title IX litigation today is the question of which standard should be applied to evaluate discrimination claims. This uncertainty is disastrous for these *amici* and for all educational institutions subject to Title IX because they can never ascertain with any confidence whether a particular educational offering is in compliance with the statute's mandate.

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[1] *Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824 (10th Cir. 1993); *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983); *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993); *Cannon v. University of Chicago*, 648 F.2d 1104 (7th Cir.), *cert. denied*, 454 U.S. 1128 (1981).

A. The exceptional importance of this issue, and a complete understanding of just how far the confusion has spread among the lower courts, is evident only from a full survey of recent federal court rulings which have determined the controlling standard for Title IX liability. In this area, which at least one court of appeals has labeled a "quagmire," *Pfeiffer v. School Bd.*, 917 F.2d 779, 788 (3d Cir. 1990), there are no less than *six* distinct standards—all with separate fundamental elements, all with different rebuttable and irrebuttable presumptions, and all with conflicting burdens of proof.

1. The Tenth Circuit Standard. At the far end of the spectrum lies the standard adopted by the court below. Beginning with the presumption that Title VII is the most appropriate analogue when defining Title IX's substantive standards—a presumption which directly contradicts one of this Court's prior holdings [2]—the court below concluded that an intentional act of discrimination is not a required element under Title IX. Rather, because a plaintiff may make out a Title VII discrimination claim by proving disparate impact, the same type of analysis is sufficient to meet the requirements of Title IX.

But after reaching this conclusion, the court below, without any explanation, did not adopt the shifting-burden standard which governs Title VII claims of disparate impact and disparate treatment. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977). Instead, it fashioned a unique standard by lifting selected factors and policy interpretations from administrative regulations and by using them to establish a strict three-pronged liability test:

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[2] *See Cannon v. University of Chicago*, 441 U.S. 677, 694-696 (1979) ("Title IX was patterned after Title VI of the Civil Rights Act of 1964. . . . The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years.").

> (1) whether there is a statistical disparity between males and females in their athletic participation as compared to their undergraduate enrollment;
>
> (2) whether the institution has expanded and continues to expand opportunities for participation by the underrepresented gender; and
>
> (3) whether the interests and abilities among members of the underrepresented gender are being fully and effectively accommodated.

See Pet. at C-8 - C-9. In other words, a statistical disparity between men and women is conclusive and irrebuttable proof of a Title IX violation unless the educational institution can show "continual expansion" of programs for the underrepresented gender, or unless it "fully and effectively accommodates" the interests and abilities of that gender. *Id.*

To take refuge under the "continual expansion" prong, a university must show that, from the mid-1970s to the present, it has continually and without pause expanded athletic opportunities so as to narrow the statistical disparity. Pet. App. at C-12 - C-13. This is an especially rigorous standard considering the fact that Title IX did not apply to most athletic programs until March 22, 1988, when the Civil Rights Act of 1987 took effect. *See* 20 U.S.C. §§ 1687-1688. Prior to that time, this Court had expressly held that Title IX was program-specific—that is, it did not apply to university and high school athletic programs absent direct federal funding. *Grove City v. Bell,* 465 U.S. 555 (1983). But under the second prong it is insufficient that the university show "continual expansion" of athletic programs for the underrepresented gender since 1988. Rather, the prong will apply only in those rare instances where a university has continually and voluntarily expanded its athletic programs over the past twenty years, even though during the first fifteen years Title IX did not require such expansion.[3]

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[3] The case below is a prime example. From the time Title IX became applicable to athletic programs in 1988, CSU has reduced

Similarly, the third prong of the lower court's standard rarely comes into force. The prong will be satisfied only if there are *no* current members of the underrepresented gender with unaccommodated interests and abilities:

> If there is sufficient interest and ability among members of the statistically underrepresented gender, not slaked by existing programs, an institution necessarily fails this prong of the test.

Pet. App. at C-15 - C-16 (citation and quotation omitted).

Thus, in practice, the Tenth Circuit standard requires no more than a showing of pure disparate impact. Absent very unusual circumstances—where an educational institution over the past twenty years has "continually expanded" its athletic programs for the underrepresented gender or where the educational institution is currently meeting all of the interests and abilities of that gender—a Title IX violation is established by a mere statistical disparity between the number of male and female athletes in comparison to the number of males and females in the educational community as a whole.

2. *The First Circuit Standard.* Unlike the Tenth Circuit, the First Circuit in *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993), concluded that Title VII is not the proper analogue to Title IX; accordingly, it refused to apply any of Title's VII's burdens or standards. *Id.* at 901-902. Further, the court implicitly rejected the holding of the Seventh Circuit that an intentional discriminatory act is a crucial element of any Title IX claim. 991 F.2d at 901-902. It also expressly rejected the pure disparate impact standard, concluding that "a Title IX

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its statistical disparity from 15.6% to 10.5%. Pet. App. C-11 - C-13. At this rate, CSU would almost wipe out any statistical disparity shortly after the turn of the century. But the court below directly held that this progress was insufficient to meet the "continuing expansion" prong, because CSU had made little or no progress during the mid-1980s. The fact that CSU had absolutely no duty under Title IX to expand its female athletic programs during this time seems utterly lost on the court below.

plaintiff in an athletic discrimination suit must accompany statistical evidence of disparate impact with *some further evidence of discrimination . . . .*" *Id.* at 895 (emphasis added). It remains unclear exactly what type of "further evidence" will satisfy this standard, or how much additional evidence is necessary. *See* Pet. at 16, n.20. What is clear, however, is that the First Circuit standard falls somewhere along the spectrum between the Tenth Circuit's pure disparate impact standard and the Seventh Circuit's requirement that plaintiff prove an intentional act of discrimination.

3. The Third Circuit Standard. In two recent cases, the Third Circuit has also provided guidance as to the standards it will apply in adjudicating Title IX claims. *Williams v. School Dist. of Bethlehem*, 998 F.2d 168 (3d Cir. 1993); *Pfeiffer v. School Bd.*, 917 F.2d 779 (3d Cir. 1990). First, unlike the Tenth Circuit, the Third Circuit applies Title VI substantive standards to Title IX claims. *Pfeiffer*, 917 F.2d at 788. Second, and again unlike the Tenth Circuit, the Third Circuit standard focuses neither on a single factor nor on a rigid three-pronged test. Instead, in determining whether a program discriminates on the basis of gender, the Third Circuit engages in a broad evaluation of the "benefits, treatment, services or opportunities afforded male and female athletes in the institution's program as a whole." *Williams*, 998 F.2d at 176 (citation omitted). This presumably includes consideration of all factors identified in the OCR regulations, along with numerous other case-by-case considerations which may be material to the particular program at issue. This broad, far-reaching analysis is best labeled as a balancing approach, which evaluates programs under diverse factors that may differ greatly from institution to institution and that may carry substantially different weight depending upon the factual context in which they arise.

4. The Title VII/McDonnell-Douglas Standard. Still other federal courts in Title IX cases have simply adopted the identical substantive standards established by this

Court for Title VII cases. *See Cook v. Colgate Univ.*, 802 F. Supp. 737 (N.D.N.Y. 1992), *order vacated as moot*, 992 F.2d 17 (2d Cir. 1993); *Sharif v. New York State Educ. Dep't*, 709 F. Supp. 345 (S.D.N.Y. 1989). Like the Tenth Circuit, but in direct contradiction to the First and Third Circuits, these courts hold that Title VII is the model from which to take substantive liability standards. 802 F. Supp. at 743; 709 F. Supp. at 361-362. Moreover, because Title VII allows pure disparate impact claims, so too does Title IX. *Id.* Unlike the Tenth Circuit's standard, however, this approach actually incorporates the shifting burden analysis of *McDonnell-Douglas* to evaluate disparate impact claims. Thus, a plaintiff must first prove a disproportionate impact or effect. If this showing is made, the burden shifts to the defendant to prove an "educational necessity" or other justification for the disparate impact. If the defendant meets this requirement, the burden shifts back to the plaintiff to show that the defendant's justifications are pretextual. *Id.*

When compared to the standard adopted by the Tenth Circuit, the conflict between the approaches is obvious. While under the Title VII standard an educational institution may point to any justification or well-grounded reason to explain the statistical disparity, under the Tenth Circuit standard the institution's response is limited solely to showing that it has "continually expanded" its programs to diminish the disparity, or that it has "fully and effectively accommodated" the interests of the underrepresented gender. Pet. App. at C-9. Stated another way, while the *McDonnell-Douglas* standard throws open the door so as to consider every possible reason for the statistical disparity, the Tenth Circuit approach forcefully holds the door closed to only a crack. No matter how great the justification, and no matter how well-grounded the institution's arguments as to the nondiscriminatory cause of the statistical disparity, they are immaterial unless they can "squeeze" through the Tenth Circuit's strict definitions of continual expansion or full and effective accommodation.

5. The Statute Regulations Standard. Still other lower federal courts hold that the appropriate substantive standard depends upon whether the plaintiff is seeking relief under the statute or under the regulations. Based upon a reading of the various individual opinions in *Guardians*, these courts hold that while discriminatory intent is necessary to establish a violation of Title IX, such intent is apparently unnecessary to establish a violation of the OCR regulations implementing Title IX. *Fulani v. League of Women Voters Educ. Fund*, 684 F. Supp. 1185 (S.D.N.Y. 1988), *aff'd*, 882 F.2d 621 (2d Cir. 1989); *Haffer v. Temple Univ.*, 678 F. Supp. 517 (E.D. Pa. 1987), *modified*, 1988 WL 3845 (E.D. Pa. January 19, 1988). These courts offer no explanation as to how an implementing regulation, which draws its authority solely from the underlying statute, can disregard the intentional discrimination standard required under that statute.[4]

6. The Seventh Circuit Standard. At the near end of the spectrum lies the standard adopted by the Seventh Circuit in *Cannon*. This standard expressly requires that plaintiff prove an *intentional discriminatory act* as part of her prima facie case under Title IX. 648 F.2d at 1109-1110. As with so many of the standards spread along the spectrum, this one is in direct conflict with many of the competing approaches. Thus, in specific contradiction to the Tenth Circuit and Title VII standards, the Seventh Circuit approach expressly recognizes that Title VI standards provide the best "guidance regarding the proper interpretation of Title IX." 648 F.2d at 1106. Moreover, *Cannon* specifically raises, considers, and rejects the

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[4] *See Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 613 (1983) (O'Connor, J., concurring in the judgment) ("If, as five Members of the Court concluded in *Bakke*, the purpose of Title VI is to proscribe *only* purposeful discrimination in a program receiving federal financial assistance, it is difficult to fathom how the Court could uphold administrative regulations that would proscribe conduct by the recipient having only a discriminatory *effect*. Such regulations do not simply 'further' the purpose of Title VI, they go well *beyond* that purpose.") (emphasis in original).

statute/regulation approach, expressly holding that "the regulation can not impose a standard broader than that imposed by [Title IX]." *Id.* at 1109 n.4. Finally, and perhaps most importantly, the Seventh Circuit standard clashes with all of the other approaches in that it requires the plaintiff to prove an actual intent to discriminate on the part of the educational institution. The mere fact that an institution's policies may have created a disparate impact is insufficient. *Id.* at 1109. So too it is insufficient for plaintiff to prove that the educational institution knew of this disparate impact but failed to take appropriate remedial steps. *Id.* at 1110. Rather, absent evidence that an educational institution acted *intentionally* to discriminate on the basis of gender, a Title IX claim fails as a matter of law. *Id.* at 1109-1110.

B. The substantive standard to be applied to Title IX means everything. An educational institution's approach to the programs it offers to males and females will differ dramatically depending on whether liability arises under a pure disparate impact standard, under a balancing standard, under a shifting burdens standard, under a statute/regulation standard, under an "intentional act" standard, or under some other standard, as yet undefined. Educational institutions will be able to measure their conduct and ensure their compliance with Title IX only after they are clear on the specific test that courts will use to determine discriminatory conduct.

The standards presently used by the courts of appeals and district courts range across a broad spectrum. These lower federal courts are not only currently split on the question of Title IX liability,[5] they are shattered beyond any hope of reconciliation. The appropriate and governing test remains not only elusive, it remains unfathomable

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[5] *See, e.g., Yusuf v. Vassar College*, 827 F. Supp. 952, 956 (S.D.N.Y. 1993) ("Interestingly, neither the Supreme Court nor the Court of Appeals for the Second Circuit has determined specifically whether intent must be shown in Title IX cases. In fact, courts examining the issue are divided.") (citations omitted).

in a "quagmire" of contradictory opinions and holdings. *Pfeiffer v. School Bd.*, 917 F.2d 779, 788 (3d Cir. 1990). The confusion cannot be allowed to persist. This case presents an excellent vehicle for this Court to resolve the confusion and to illuminate the appropriate standard which governs Title IX liability.

II. THE DISPARATE IMPACT STANDARD ADOPTED BY THE LOWER COURT PLACES AN OVERWHELMING AND INAPPROPRIATE BURDEN ON EVERY EDUCATIONAL INSTITUTION SUBJECT TO TITLE IX.

A. The Standard Adopted by the Lower Court Presents Far-Reaching Issues of Exceptional Importance Extending Not Only to Athletics, But to All Programs Offered by Educational Institutions.

At the outset, it is crucial to keep in mind Title IX's broad application. Without question, the statute's anti-discrimination provisions apply to every intercollegiate or high school athletic program sponsored by an institution which receives any type of federal funding. 20 U.S.C. § 1687. This area alone has spawned numerous and extended litigation battles on many diverse issues.

But Title IX is in no way limited to athletic programs. Indeed, the legislative history scarcely even mentions intercollegiate or interschool athletics, *see* 118 Cong. Rec. 5,807 (1972); 117 Cong. Rec. 30,407 (1971), focusing instead on the wide variety of programs and course offerings throughout secondary and post-secondary education. This focus has not been lost on Title IX litigants, nor on the educational institutions which must comply with Title IX. Over the past decade, numerous assorted and diverse actions have alleged gender discrimination in a wide variety of areas such as medical school admissions, employment in a university's physical education department, use of endowments in a university English department, membership in the National Honor Society, chairmanship of a high-school science department, conversion of an all-girl school to a coeducational institution, and award of

merit scholarships to males and females based on SAT scores.[6]

The point here is that the lower court's disparate impact standard may very well extend beyond alleged discriminatory exclusion in university athletics to all programs offered by an institution, athletic or non-athletic. After all, if the Tenth Circuit's disparate impact analysis truly is the standard for determining gender discrimination in an institution's operations, it seemingly makes little difference whether the area of focus is on athletic programs, on theatre and dance programs, on academic programs, on student-aid programs, on clubs recognized or financed by the educational institution, on various colleges or departments within the institution itself, or on some other part of the educational institution's curriculum. Indeed, a different test for some or all of these areas would substantially contradict the single dictate of the statute which prohibits discrimination in "*any* education program or activity." 20 U.S.C. § 1681(a) (emphasis added). A test with such broad and crucial ramifications deserves the review and consideration of this Court. *Cf. Hazelwood Sch. Dist. v. United States,* 433 U.S. 299 (1977) (*certiorari* granted "to consider a substantial question affecting the enforcement of a pervasive federal law").

B. The Lower Court's Disparate Impact Standard Creates Devastating and Unintended Consequences For All Educational Institutions Subject to Title IX.

Engaging in a detailed analysis of this Court's prior opinions and of Congress's express intent memorialized within the statute itself, the petition thoroughly and per-

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[6] *See Cannon v. University of Chicago,* 648 F.2d 1104 (7th Cir.), *cert. denied,* 454 U.S. 1128 (1981); *Marby v. State Bd. of Comm. Coll & Occ. Educ.,* 813 F.2d 311 (10th Cir. 1987); *Chance v. Rice Univ.,* 984 F.2d 151 (5th Cir. 1993); *Pfeiffer v. School Bd.,* 917 F.2d 779 (3d Cir. 1990); *Nagel v. Avon Bd. of Educ.,* 575 F. Supp. 105 (D. Conn. 1983); *Jones v. Board of Educ.,* 632 F. Supp. 1319 (E.D.N.Y. 1986); *Sharif v. New York State Educ. Dep't,* 709 F. Supp. 345 (S.D.N.Y. 1989).

suasively shows that the lower court's disparate impact standard is in direct conflict with previously recognized standards governing Title IX. Pet. at 17-20. Even if the petition were incorrect, however, the lower court's pure disparate impact standard would merit this Court's review because of the extraordinary and catastrophic effects such a standard will have upon programs offered at educational institutions.

1. The court below determined that initial liability requirements under Title IX are satisfied by a showing of a statistical disparity between the number of males and females who participate in athletic programs and the number of males and females who comprise the educational campus as a whole. Pet. App. at C-10 - C-12. Unfortunately, the court of appeals provided little guidance on what constitutes "substantial disparity" except to conclude that a 10.5% disparity violates the standard. *Id.* at C-12. The district court provided somewhat better direction, openly stating that a 1.7% gap would be "acceptable." *Id.* at A-19.

On two different fronts, this statistical standard decimates all types of programs offered by educational institutions while failing to provide any real assurance of equal opportunity. First, the statistical analysis used under the lower court's standard flounders in attempting to measure discriminatory treatment, the single evil which Title IX seeks to remedy. This is because—totally without support, citation, or explanation—the decision below embraces the assumption that, at all educational campuses across the nation, men and women have the same interests and qualifications to participate in competition. This assumption not only skews the entire analysis as to whether university programs provide equal accommodation to males and females according to their interests, it also directly violates this Court's instructions governing the use of statistical analyses to establish discriminatory exclusion.

It is true that, in a number of different contexts, this Court has previously determined that statistical analyses

may "serve an important role as *one indirect indicator*" of institutional discrimination. *Mayor v. Educational Equality League*, 415 U.S. 605, 620 (1974) (emphasis added). But this Court has also strongly cautioned lower courts against comparisons to the general population when special interests or qualifications are required. *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 n.13 (1977). Thus, while statistical comparisons to a general population may be probative for unskilled or entry level positions,

> where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501 (1989).

Given today's status of intercollegiate athletics (and even high school varsity sports), no one can seriously contend that the skill and interest necessary to compete are possessed equally by all students in the educational community. If statistical disparity analysis is to be used at all then, it must look to the qualifications and interests of males and females in the university community. More specifically, the analysis must measure any disparity between male and female athletic opportunities, not *in comparison to the number of males and females in the entire educational community*, but rather *in comparison to the number of males and females who possess the special qualifications and interests necessary to compete at the intercollegiate or varsity level.* The standard for statistical analysis established by the court below strays far afield from these recognized principles. As in *Mayor*, "the simplistic percentage comparisons undertaken by the Court of Appeals lack real meaning" in determining whether discriminatory exclusion has occurred here. 415 U.S. at 620.

Second, even if the unsupported statistical analysis established by the court below were somehow acceptable, the lower court's pure disparate impact standard cannot survive because it fails to give educational institutions the

opportunity to rebut or explain the statistical disparity. Significantly, with only a handful of possible exceptions, no university competing athletically at the Division I level can satisfy the proportionality requirement as it is set forth under the lower court's standard. *See* Pet. at 8 n.11. Far above Colorado State's disparity percentage of 10.5%, the NCAA average for all reporting Division I schools approaches 20%. *NCAA Gender-Equity Study, Summary of Results*, March 1992 at 4. While this disparity can be explained through several different legitimate justifications, these justifications do a university absolutely no good under the lower court's standard.[7]

Had the lower court followed through on its conclusion that Title VII supplies the substantive standards for deter-

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[7] At many universities, the disparity will stem directly from the different level of interest and ability between the male and female student population. Even at those universities where interest and ability are approximately equal, however, the differences in male-dominated and female-dominated sports go a long way in explaining the disparity. Of the 19 sports tracked by the NCAA, Division I universities provide more female teams than male teams in seven sports (cross country, field hockey, gymnastics, swimming, tennis and volleyball), provide a substantially equal number of male and female teams in four sports (basketball, fencing, skiing, and track), and provide more male teams than female teams in eight sports (baseball, football, golf, ice hockey, lacrosse, rifle, soccer, water polo and wrestling). *NCAA Gender-Equity Study, Summary of Results*, March 1992 at 4.

The great disequalizer comes in the form of men's football. With no women's football teams, with male teams averaging over 100 players per program, and with no other sport able to accommodate even close to this number of participants, the statistical disparity arises practically from football alone. Indeed, if football were eliminated, the disparity would immediately become negligible, somewhere near 5%. *Id.*

To be sure, whether these and other factors are justification for the current disparity remains in question, and may be determinable only on a case-by-case basis. The crucial point, however, is that the standard adopted by the court below does not even allow the university to present these possible justifications. Instead, after a statistical disparity has been shown by the plaintiff, the university's only recourse is to satisfy the continual expansion or full and effective accommodation prongs. Pet. App. at C-9.

mining a violation under Title IX, it would have at least provided the university with a method whereby it could present its educational or other justifications for a substantial statistical disparity. Such an opportunity is not available under the lower court's standard measuring liability under Title IX. Once a substantial disparity is proven by plaintiff, that "safe harbor" is closed, and the "institution must show that it has expanded and is continuing to expand the opportunities for athletic participation by the underrepresented gender, or else it must fully and effectively accommodate the interests and ability among members of the underrepresented gender." Pet. App. at C-9.

Taken together, these two considerations create almost insurmountable obstacles for compliance with Title IX. With few exceptions, no Division I university will pass a statistical disparity test which focuses solely on the percentage of males and females attending the university, regardless whether these individuals have the interests or qualifications to participate in competitive sports. Nor, faced with a disparity that it cannot avoid, can a university bring forth justifications for the differing percentages, no matter how valid those reasons might be. Given these rules, the result is determined before the analysis ever begins.

2. Stripped to its essentials, the lower court's disparate impact standard provides great cause for concern. Initially, the standard gives the educational institution absolutely no discretion to eliminate larger men's programs and smaller women's programs so as to narrow the statistical disparity. Pet. App. at C-15 - C-16. Indeed, that is exactly what Colorado State attempted to do in the case below. Practically speaking, this power is crucial to universities if they are to deal with existing budget difficulties and at the same time reduce the purported statistical disparity. Immense operational costs (like those required to maintain an indoor tennis facility, an indoor track facility, a special lacrosse field or a gymnastics training center) remain unchanged if only the male program can be eliminated, because the female program will still

require that the large operational costs be incurred. Thus, while instructing educational institutions to do everything possible to diminish a purported statistical disparity, the lower court's standard takes away one of the most effective tools for doing so.

The corollary principle is that, while a purported statistical disparity exists, no current women's athletic program may be cut over the objection of team members, no matter how costly or impractical the program has become. This knowledge creates an enormous disincentive to establish additional women's programs at universities. Even if only experimental or temporary, university athletic administrators will know that once a women's program is there, it is there to stay.

Most importantly, the institution's ability to choose the best method for allocating athletic resources on a fair and nondiscriminatory basis is severely curtailed. Indeed, as the court below expressly recognized, except in those very few instances where budgetary considerations will allow a university to massively increase the number of its women's athletic programs, the only true option available to educational institutions is to eliminate the disparity by cutting men's athletic slots and by replacing them with female athletic slots. *See* Pet. App. at C-21 - C-22. Although never before raised in a Title IX suit, given this Court's pronouncements in other contexts regarding the permissible scope of antidiscrimination plans, cutting male athletic positions and replacing them with female positions solely to achieve gender balance raises grave constitutional and civil rights concerns. *See Steelworkers v. Weber,* 443 U.S. 193, 208 (1979); *Johnson v. Transportation Agency,* 480 U.S. 616, 638 (1987).

This gender-focused analysis is the paramount concern, and the reason which alone merits this Court's grant of *certiorari.* The extraordinary standard adopted by the court below requires educational institutions to restructure their athletic programs—intentionally eliminating men's programs solely because their participants are male and

intentionally creating women's programs solely because their participants are female—all in the name of "gender proportionality". The level of athletic interest between males and females is irrelevant. The various justifications for a statistical imbalance are immaterial. The broad and diverse interests within a particular university have no place in the analysis. Instead, the establishment, maintenance, funding and elimination of particular university programs are driven *by gender alone.*

Whatever the ultimate merits of the lower court's standard, it surely represents a major departure from previous precedent, requiring actions of educational institutions which have never been required before. Before such radical—and perhaps irreversible—changes occur, this Court should determine whether the lower court's standard is consistent with the purposes and dictates of Title IX.

III. THE REMEDIAL SCHEME APPROVED BY THE COURT BELOW HAS A PROFOUND EFFECT UPON THE ADMINISTRATION OF ALL EDUCATIONAL INSTITUTIONS SUBJECT TO TITLE IX.

As fully described in the petition, Pet. at 21-23, the remedial rules established by the court below directly contradict the rules applied in the First Circuit, creating a conflict which alone is worthy of this Court's review. But perhaps even more important than this conflict, the Tenth Circuit's scheme violates firmly held constraints which directly govern a federal court's remedial power. In constitutional and statutory cases alike, this Court and others have long required that a remedy be narrowly tailored to correct a defendant's violation.[8] This principle takes on special concern when state or local educational institutions are involved. As this Court has expressly recognized on more than one occasion:

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[8] *See e.g., Milliken v. Bradley*, 433 U.S. 267 (1977); *United States v. City of Parma*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982).

> [T]he federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs . . . . [S]chool authorities have the *primary* responsibility for elucidating, assessing, and solving [discrimination] problems . . . ."

Milliken, 433 U.S. at 280-281 (emphasis in original) (quotation and citation omitted). Thus, after finding a violation a district court should initially order the offending educational entity to formulate a plan which will bring it into compliance. The court may then review and hear objections to this plan to determine whether it adequately remedies the violation previously found. *Missouri v. Jenkins*, 495 U.S. 33, 52 (1990) ("By no means should a district court grant local government *carte blanche*, but local officials should at least have the opportunity to devise their own solutions to these problems.") (citation omitted).

The court below took exactly the opposite stand. Determining that the harms plaintiffs had sustained and the relief they had requested were softball specific, the court expressly rejected the university's argument that it should be allowed to formulate a plan to bring itself into compliance with Title IX. Pet. App. at C-19 - C-22. Instead, the court simply ordered the reinstatement of women's softball at Colorado State. The approach severely misapplies Title IX and strikes a motal blow to its fundamental objectives. Title IX conveys to plaintiffs the right to be free from gender discrimination in a university's creation and administration of its athletic programs. It *does not* convey to plaintiffs the right to participate in intercollegiate softball or any other specific sport. Assuming that a statistical disparity alone constitutes a violation of Title IX, the method by which compliance is to be achieved—by hiring or firing staff, by establishing or eliminating university programs, by expanding or contracting the slots available in those programs, by spending more or less money in a given area—is a decision which belongs to the university. It is one thing to order a university to

weigh the various choices and to bring itself into compliance with Title IX; it is quite another to order a university, program-by-program and expenditure-by-expenditure, to follow one of the several courses of action available to it. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (a university has a special right "to make academic judgments as to how best to allocate scarce resources") (citation and quotation omitted).

The practical consequence of the lower court's remedial scheme is to eliminate a university's discretion in these areas, and to place total control of university programs and resources in the hands of the court. Thus, as occurred in the case below, a few members of the underrepresented gender with a particular interest will be able to force a university to implement or retain a specific program without any broader examination as to whether other members of the underrepresented gender might benefit more from some other program, and without any consideration as to whether it may be better to reduce men's programs, add different women's programs, or take some other action to bring the university into compliance.

Moreover, once a program is established at the university in compliance with the lower court's remedial order, the sport will remain in perpetuity regardless of its practicality, cost, or overall benefit to the university community. It is true, as the lower court recognized, that the current softball plaintiffs will someday graduate or transfer from the university. Pet. App. at C-21. But those team members will be replaced by other, younger team members, whom under the lower court's order the university is forced to recruit to ensure "team development." *Id.* C-22. The process thus becomes a vicious circle, with current team members forcing the university to maintain a softball program and recruit new players for the future, and with those future players becoming the plaintiffs of tomorrow to ensure that their current interests and abilities—interests and abilities which the university is forced to nurture and magnify under the lower court's remedial

scheme—do not go unaccommodated. There is absolutely no evidence that Congress intended such a result under Title IX.[9]

Whatever the merits of the Tenth Circuit's approach, there can be little dispute that it is extraordinary, and that it greatly reduces the previous discretion given to educational institutions in complying with antidiscrimination provisions. Its potential impact is devastating and irreversible to more than 1250 institutions of higher education across the country, not to mention the thousands of secondary schools and other institutions subject to Title IX's provisions. Before such a remedial scheme becomes entrenched, this Court should grant review to determine if it is consistent with the dictates and purposes of Title IX.

CONCLUSION

This Court should issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

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[9] Moreover, coupled with the "continual expansion" prong, the remedial scheme actually moves full compliance. Believing that it had responsibility to increase women's athletics in the 1970s, Colorado State made an extraordinary effort and successfully added eleven new sports for women. Having expended substantial resources in this endeavor, no new sports were added in the early and middle 1980s. The late 1980s and early 1990s brought renewed efforts from the university, with new resources and reallocation again substantially diminishing the disparity. Colorado State's mistake—now that it has the benefit of the lower court's remedial scheme and its "continual expansion" prong—is that it should not have created all eleven women's programs at essentially the same time. Rather, it should have bided its time, adding a new women's program every one or two years, so that over the two decades it could plainly show that it had "continually expanded" its athletic opportunities for women. Of course, the young women who attended Colorado State University during the late 1970s and early 1980s would not have had as many diverse athletic programs available to them, but that consideration apparently counts for very little under the lower court's overall remedial scheme.

Respectfully submitted,

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No. 93-559

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

COLORADO STATE BOARD OF AGRICULTURE,
in its capacity as the governing board
of the Colorado State University,
Petitioner,

v.

JENNIFER ROBERTS, JULIE OSBORNE, JANET BRUMBELOW, LAURA BIELAK, SARA STOUT, AMY RECOUPER, JENNIFER JACOBS, MALIA KUENZLI, STACIE STAFFORD, HEATHER NAKASONE, KIM JOHNSON, AIMEE RICE AINSWORTH, and LISA MIZE, in their individual capacities,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF BROWN UNIVERSITY AND COLGATE UNIVERSITY AS AMICI CURIAE IN SUPPORT OF PETITIONER

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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MOTION OF BROWN UNIVERSITY AND COLGATE UNIVERSITY FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, Brown University ("Brown") and Colgate University ("Colgate") hereby move for leave to file the attached brief amici curiae in support of the petition for writ of certiorari. Petitioner Colorado State Board of Agriculture has consented to the filing of the brief; its written consent is filed concurrently herewith. Respondents Jennifer Roberts, *et al.*, have denied consent.

1. Brown and Colgate are institutions of higher education that are directly affected by the application of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, to their intercollegiate athletic programs. Brown is the defendant in another case that raises issues virtually identical to those at issue here. *See Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993) (affirming issuance of preliminary injunction). Colgate is the defendant in a case that likewise raises similar issues under Title IX. (An earlier suit raising the same allegations against Colgate was dismissed as moot. *See Cook v. Colgate Univ.*, 992 F.2d 17 (2d Cir. 1993).) The Tenth Circuit substantially relied upon *Cohen* in reaching the decision from which the petition for certiorari in the present case arises. The decision in the present case will have a direct and substantial effect on the ability of Brown and Colgate to administer their athletic programs in a fair and efficient manner.

2. Pursuant to Rule 37.1 of the Rules of this Court, Brown and Colgate move to file their brief amici curiae to bring "relevant matter[s] to the attention of the Court that [have] not already been brought to its attention by the parties" that strongly support exercise of the Court's jurisdiction. The brief highlights the following issues, in addition to the matters addressed in detail in the petition for writ of certiorari.

3. First, the brief highlights the stark contradiction between the Tenth Circuit's holding and the express provisions of Title IX. The Tenth Circuit ruled that no educational institution may cut any women's athletic program so long as the percentage of women among those at the institution who participate in athletics is less than the percentage of women in the institution's overall enrollment. This directly contravenes 20 U.S.C. § 1681(b), which provides that educational institutions are *not* required "to grant preferential or disparate treatment to the members of one sex" based only on this type of purely statistical disparity.

4. Second, the brief explains the direct conflict between this Court's precedents interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to -17, which contains virtually the same language disfavoring preferential treatment found in Title IX, and the result reached by the Tenth Circuit herein in interpreting Title IX.

5. Finally, the brief argues that the Court should grant certiorari to interpret Title IX to avoid the result reached by the Tenth Circuit, thereby avoiding serious equal protection concerns raised by the lower court's holding.

In order to bring these matters to the attention of the Court, Brown and Colgate respectfully move for leave to file the accompanying brief in support of the petition for writ of certiorari.

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November 3, 1993

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BRIEF OF BROWN UNIVERSITY AND COLGATE UNIVERSITY AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI CURIAE

Brown University ("Brown") and Colgate University ("Colgate") are institutions of higher education that are directly affected by the application of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, to their intercollegiate athletics programs.

Brown is the defendant in a case that is very nearly identical to this one. In the litigation against Brown, members of two women's teams that the university proposed eliminating (along with two men's teams) sought and obtained a preliminary injunction against the elimination of their teams. On interlocutory appeal, the First Circuit issued an opinion affirming the issuance of the preliminary injunction. *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993). The Tenth Circuit substantially relied upon *Cohen* in reaching the decision from which the petition for certiorari in the present case arises. While the opinion of the court below repeats the principal error of the First Circuit opinion, it also conflicts in important respects with that opinion. Resolution of these important issues is vital to Brown's ability to manage the necessary reduction of its athletic program and more broadly to instruct higher education, nationally, in the appropriate manner of compliance with Title IX in cases of program reductions.

Colgate is the defendant in a case, arising out of the school's failure to elevate the women's ice hockey club team to varsity status, that also raises issues similar to the issues in this case. (An earlier suit raising the same allegations against Colgate was dismissed as moot. *See Cook v. Colgate Univ.*, 992 F.2d 17 (2d Cir. 1993).) Resolution of the issues raised in the Tenth Circuit case is important to Colgate's ability to manage its athletic programs without running afoul of Title IX.

All colleges and universities, including Brown and Colgate, are faced with external financial exigencies. Some

have been required to reduce the size of their athletic programs; others may be required to do so in the future. At the same time, these colleges and universities must comply with the mandates of Title IX. Brown and Colgate therefore wish to bring to the Court's attention certain important statutory and constitutional issues raised by the opinion of the court below, as well as the practical problems that would be imposed on institutions of higher learning by the lower court's decision as these institutions confront the complex and difficult taks of deciding how and where to reduce athletic programs, and thus deny to some young women and men the opportunity to play particular sports at the intercollegiate level.

ARGUMENT

Faced with the need to reduce its expenditures for intercollegiate athletics, Colorado State University ("CSU") in 1992 chose to eliminate two varsity teams, a men's baseball team and a women's softball team. The decision eliminated 55 varsity positions for men, and only 18 for women. *Roberts v. Colorado State Univ.*, 814 F. Supp. 1507, 1514 (D. Colo. 1993); Pet. App. at A-11.[1] Moreover, the university devoted some of the savings realized by the cuts to increasing scholarships in other women's sports; it put none of the money towards men's sports.

The net result of these efforts was to increase the proportion of athletic opportunities for women at CSU from 35.2 percent of the total opportunities to 37.7 percent. *Id.* at 1512; Pet. App. at A-7.[2] After cutting the baseball and softball programs, CSU continued to sponsor more women's sports (8) than men's sports (7). CSU, moreover, had been found to be in compliance with Title IX in 1989 by the Department of Education's Office for Civil

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[1] Citations to "Pet. App." are to the page numbers in the appendix included with the petition for certiorari.

[2] The university's actions also had the result of decreasing, from 12.7 percent in the 1991-92 academic year to only 10.5 percent the following year, the difference between the women's intercollegiate athletic participation rate and the women's enrollment rate at CSU. *Roberts*, 814 F. Supp. at 1512; Pet. App. at A-7.

Rights (the "OCR"), the agency charged with administering Title IX.[3]

Despite these facts, the court below held that CSU's actions in eliminating the baseball and softball teams violated Title IX. Title IX itself prohibits only "discrimination," 20 U.S.C. § 1681(a), and indeed it contains language expressly providing that it shall *not* be interpreted "to require any educational institution to grant preferential . . . treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating" in the federally-supported program or activity in question. 20 U.S.C. § 1681(b).

In the face of this explicit statutory language, the the Tenth Circuit, following the lead of the First Circuit in *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993),[4] nonetheless found CSU in violation of Title IX by applying a 1979 "Policy Interpretation" of the statute issued by the OCR. *See Title IX of the Education Amendments of 1972: A Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413, 71,418 (1979) (the *Policy Interpretation*). The *Policy Interpretation* was drafted, and initially applied, at a time when universities were expanding athletic opportunities. The Tenth Circuit, however, rigidly applied the *Policy Interpretation* in the very different context of declining funding, and held that under it CSU must cut *only* men's athletic programs because, in comparison with the school's undergraduate enrollment, men's participation in CSU's intercollegiate athletic programs exceeded women's participation.

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[3] *See* March 8, 1989 letter from Gilbert D. Roman, Regional Director of the OCR, to Dr. Philip E. Austin, President of CSU; Pet. App. at D-1 to D-3 (announcing that OCR was terminating its monitoring of CSU's athletic programs because CSU had "achieved compliance with Title IX . . . and its implementing regulation, 34 CFR Part 106").

[4] *See Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824, 831 (10th Cir. 1993); Pet. App. at C-15 to C-16 (citing *Cohen*).

Such a drastic holding might be justified if it were premised on a finding that the disparate athletic participation ratios at CSU themselves were the result of discrimination by CSU against female athletes. The Tenth Circuit, however, did not base its decision on any such finding. Rather, it rested its holding exclusively on the raw disparity in CSU's athletic participation ratios, together with the fact that, as a result of the 1992 cutbacks, there were some women athletes at CSU—the plaintiffs, former members of the softball team—whose "interests and abilities" were not fully accommodated.

Given the severe economic constraints confronting higher education today, the Tenth Circuit's holding affects every institution of higher learning that receives federal financial assistance. Since male athletic participation ratios exceed female ratios at virtually all such institutions, the Tenth Circuit's holding, unless reversed, will require that at all of these schools, whenever athletic program cutbacks are necessary, the cuts come *solely* from men's athletic programs. This extreme result violates the clear language of Title IX. If left undisturbed, it would make impossible the fair and efficient administration of athletic programs at virtually all educational institutions throughout the country. This Court therefore should grant certiorari in order to reverse the decision.

Moreover, the position taken by the Tenth Circuit contravenes holdings by this Court interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to -17. That statute prohibits the imposition of liability solely on the basis of evidence of statistical disparities. Title IX contains language that is virtually identical, which the Tenth Circuit completely disregarded in reaching its result. This Court therefore should grant certiorari in order to apply its established interpretation of Title VII to the virtually identical language of Title IX.

Finally, the Court should grant certiorari in order to interpret Title IX to avoid the serious equal protection concerns raised by the lower court's holding.

I. THE HOLDING OF THE COURT BELOW, THAT LIABILITY MAY BE BASED SOLELY ON EVIDENCE OF DIFFERING MALE AND FEMALE ATHLETIC PARTICIPATION RATES, WITH NO SHOWING OF DISCRIMINATION, DIRECTLY CONTRADICTS THE CLEAR LANGUAGE OF TITLE IX AND RAISES ISSUES OF PROFOUND IMPORTANCE FOR VIRTUALLY EVERY EDUCATIONAL INSTITUTION.

Despite the fact that CSU's 1992 cutbacks improved women's participation opportunities in comparison with those of their male counterparts, the Tenth Circuit found that CSU violated Title IX by failing to place the entire burden of absorbing the 1992 cutbacks on men. This holding, based solely on the fact that the proportion of women among CSU athletes at the time the cuts were made was smaller than the proportion of women in the student body as a whole, contravenes the clear language of Title IX and misconstrues the agency interpretations of Title IX on which the court purported to rely.

A. Title IX Does Not Require Educational Institutions to Prefer One Sex Over the Other Based Only on Statistical Evidence of Differences in Athletic Participation Rates.

Title IX prohibits educational institutions from discriminating on the basis of sex. 20 U.S.C. § 1681(a).[5] By its express terms, however, Title IX does *not* require schools to prefer one sex over the other based merely on statistical evidence that one sex participates less than the other in a particular program or activity:

> Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number

---

[5] 20 U.S.C. § 1681(a) provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."

> or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, state, section, or other area. . . .

20 U.S.C. § 1681(b).

The Tenth Circuit recognized that this language means that "a Title IX violation may not be predicated solely on a disparity between the gender composition of an institution's athletic program and the gender composition of its undergraduate enrollment[.]" 998 F.2d at 831; Pet. App. at C-14. There is good reason for this rule. Creation or elimination of varsity positions has no impact on students generally; it affects only athletes. There was no proof below that the percentages of women and men at CSU who were interested in athletics were identical. Indeed, the evidence was to the contrary. For example, in Colorado high schools (from which the vast preponderance of the CSU student body is drawn), female athletic participation is lower than male participation. As explained below, however, the effect of the Tenth Circuit's decision is to predicate liability on precisely the type of disparate impact evidence prohibited by Title IX, with no requirement whatever that the disparity have resulted from discrimination by the institution involved.

B. The Three-Part "Policy Interpretation" Test Used by the Court Below, When Applied In the Context of Program Cutbacks, Violates Title IX and Its Implementing Regulations.

The formal regulations under Title IX require recipients of federal funds to "provide equal athletic opportunity for members of both sexes" and list ten non-exclusive factors for determining whether an institution has met this requirement.

One of these ten factors requires consideration of "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities

of members of both sexes[.]" 34 C.F.R. § 106.41(c)(1).[6] The Tenth Circuit's error came when it tried to determine whether CSU's actions had "effectively accommodated" the interests and abilities of both male and female athletes. To do so, the court relied exclusively on a three-part test contained in the OCR's 1979 *Policy Interpretation*, which provides that an institution "effectively accommodates" interests and abilities if any of the following requirements are satisfied:

> (1) "participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments;" or
>
> (2) if participation opportunities are not substantially proportionate, "the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the [underrepresented] sex;" or
>
> (3) if participation opportunities are not substantially proportionate and the institution cannot show a history or continuing practice of program expansion, "it can be demonstrated that the interests and abilities of the [underrepresented] sex have been fully and effectively accommodated by the present program."

44 Fed. Reg. at 71,418.

The Tenth Circuit recognized that the "substantial proportionality" standard contained in the first prong of this test was designed to be nothing more than a "safe harbor" for educational institutions and that schools would still comply with Title IX if they satisfied the second prong of the test (by continuing to expand opportunities for women), or the third prong (by fully accommodating the interests and abilities of women). 998 F.2d at 829; Pet. App. at C-9. By applying the *Policy Interpretation*'s

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[6] The Tenth Circuit rejected CSU's argument that a Title IX violation must be premised on an evaluation of the instituiton's overall compliance with *all* of the listed factors. 998 F.2d at 828; Pet. App. at C-7 to C-8.

three-part test in the context of CSU's 1992 program cutbacks, however, the Tenth Circuit effectively converted the "safe harbor" of the first prong into the exclusive test of CSU's liability. This was error.

1. *The Three-Part Test Was Drafted When Athletic Participation Opportunities Were Expanding for Both Sexes.*

The *Policy Interpretation*'s three-part test was created when the financial and other resources available to educational institutions were increasing. The *Policy Interpretation* itself was based on an historical analysis by the OCR of women's participation opportunities in intercollegiate athletics. This analysis, published in 1979 as an appendix to the *Policy Interpretation* itself, showed that, although differences remained, the opportunities for *both* men and women had expanded during the 1970s, with the increase in women's opportunities significantly outpacing the increase in men's opportunities. 44 Fed. Reg. at 71,419. As a result, "[t]he overall growth of women's intercollegiate programs [had] not been at the expense of men's programs." *Id.*

The three-part test, adopted in this historical context, clearly contemplates that athletic programs will continue to expand. Thus, it sets forth a path for compliance based on expanding opportunities. Under it, in an expanding universe, schools could satisfy the anti-discrimination mandate of Title IX, without penalizing or preferring either sex, by expanding programs under the second prong of the three-part test.

2. *When Applied In the Context of Program Cutbacks, The Three-Part Test Results in Liability Based Solely on Statistical Evidence of Differences in Athletic Participation Rates and Thus Violates Title IX.*

The picture changes dramatically when the assumption of an "expanding" financial universe no longer holds true. Colleges and universities throughout the country have experienced severe economic distress in recent years.

CSU has not been immune from this problem. As a result, CSU, and many other schools, have been forced to cut expenditures in many of their programs, including intercollegiate athletics.

When the three-part test is applied in this context, it becomes nothing more than a prescription for liability. Virtually no college or university in the country now meets the *first* ("substantial proportionality") prong of the test.[7] The *second* ("expanding program") prong is by definition unavailable in the context of program cutbacks. Moreover, as the Tenth Circuit interpreted the test, the *third* prong can never be satisfied if any women's program is cut because, that court held, *any* cut in a women's program means that women's interests are not being "fully and effectively accommodated."

Hence, under the Tenth Circuit's reasoning, schools now may comply with Title IX *only* by "cutting athletic programs such that men's and women's athletic participation rates become substantially proportionate to their representation in the undergraduate population"—in other words, by cutting solely from men's athletic programs until substantial proportionality is achieved. 998 F.2d at 830; Pet. App. at C-13. This rule construes Title IX as a one-way "ratchet" under which schools are absolutely forbidden to make cuts that affect women's athletic programs at all, even if the overall effect of the cuts *improves* proportionality,[8] and it converts Title IX into a

[7] As explained in the petition for certiorari, Pet. at 8 & n.11, at 297 out of 298 Division I schools, the rate of women's participation in intercollegiate athletics is lower than the percentage of women in the student body, and the reason for the rate of participation being the same as the enrollment rate at the remaining school is a state court decision that itself may have required a violation of Title IX.

[8] As noted in the petition for certiorari, Pet. at 6, the result of this reasoning is to hold CSU in violation of Title IX despite the fact that women now have a greater share of athletic opportunities than in 1989, when the OCR found CSU's athletic program to be in compliance with Title IX.

rigid requirement of statistical parity, without regard for the subtleties and complexities of university life.

The lower court's reasoning, converting the "safe harbor" of substantial proportionality into *the sole test of liability* when a school is forced to cut its athletic expenditures, flatly contradicts 20 U.S.C. § 1681(b) by making universities liable solely on the basis of a statistical showing of disparity in participation rates, with no finding that the disparity results from discrimination. Nowhere in its opinion does the court grapple with—or even explicitly recognize—this contradiction, a fact that is all the more puzzling given the court's acknowledgment, noted above, that a Title IX violation *may not* be predicated "solely on a disparity between the gender composition of an institution's athletic program and the gender composition of its undergraduate enrollment[.]" 998 F.2d at 831; Pet. App. at C-14.

3. *As Applied by the Court Below, the Three-Part Test Precludes Educational Institutions From Distributing Athletic Opportunities on the Basis of the Interests and Abilities of Both Sexes.*

Title IX and its implementing regulations mandate that educational institutions must strive to meet the interests and abilities of *both* men and women, without discrimination against either sex. The Tenth Circuit's decision utterly ignores this mandate. Under the Tenth Circuit's approach, educational institutions are required to take gender into account explicitly whenever programs must be cut. Indeed, as noted above, the court's rule forces them in such circumstances to cut only men's opportunities when substantial proportionality does not exist, even where there is no evidence that the difference in rates of participation is due to any discrimination by the institution. This absolute preference for women over men would require schools to allocate athletic opportunities explicitly "on the basis of sex," and thus directly contravenes section 1681(a).

The Title IX regulations themselves make clear that educational institutions are required to ensure equality of

opportunity, not in comparison with the number of men and women in the school population as a whole, but rather in comparison with the number of men and women who possess the "interests and abilities" necessary to compete in intercollegiate athletics. As 20 U.S.C. § 1681(b) clearly indicates, Congress, in adopting Title IX, did not assume that men and women have equal interests in participating in athletics or any other particular program offered by educational institutions. The regulations implementing Title IX likewise make no such assumption, requiring instead that schools "effectively accommodate the *interests and abilities* of members of *both* sexes." 34 C.F.R. § 106.41(c) (emphasis added). Thus, where athletic oportunities are limited, this language clearly requires that available opportunities be rationed between the sexes on the basis of demonstrated interest and ability—not on the basis of raw enrollment statistics, as the Tenth Circuit would require.

In sum, while the "substantial proportionality" prong of the three-part test can be a "safe harbor" by which a school can demonstrate compliance, it cannot be required for compliance.

The *Policy Interpretation* itself states that "the governing principle [in determining interests and abilities] is that the athletic interests and abilities of male and female students must be *equally effectively accommodated.*" 44 Fed. Reg. at 71,414. *See also id.* at 71,417 (institutions must "accommodate effectively the interests and abilities of students to the extent necessary to provide *equal opportunity* in the selection of sports and levels of competition available to members of *both sexes*") (emphasis added). The Tenth Circuit's approach, by requiring schools to cut exclusively from men's athletic programs, clearly violates this principle. This Court should grant certiorari to correct this error.

II. THE HOLDING OF THE COURT BELOW CONFLICTS WITH DECISIONS OF THIS COURT INTERPRETING THE SECTION OF TITLE VII THAT MIRRORS TITLE IX'S PROVISION DISFAVORING PREFERENTIAL TREATMENT.

Title IX's broad prohibition against sex discrimination in educational programs receiving federal assistance, 20 U.S.C. § 1681(a), was patterned on the similarly-worded prohibition against discrimination on the grounds of race, color, or national origin in federally-funded programs appearing in Title VI, 42 U.S.C. § 2000d. Unlike Title VI, however, Title IX explicitly disclaims any requirement of "preferential or disparate treatment to the members of one sex" based on statistical disparities that may exist between that sex's participation in the program in question and the "total number or percentage of persons of that sex in any community . . . ." 20 U.S.C. § 1681(b). Unlike the rest of Title IX, this provision is patterned on Title VII. *See* 42 U.S.C. § 2000e-2(j). This Court's interpretation of the admonition against preferential treatment in the employment context in section 2000e-2(j) of Title VII thus provides authoritative guidance concerning the interpretation of its nearly identically-worded Title IX counterpart. *See West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991).

The reasoning and the result in the court below are utterly incompatible with this Court's cases construing section 2000e-2(j), however. In woodenly applying the three-prong test of the *Policy Interpretation* to a situation in which an educational institution must reduce, rather than expand, its athletic offerings, the Tenth Circuit ignored those cases, which make clear that Title IX does not permit the kind of preferential treatment required by the Tenth Circuit.

As explained above, the Tenth Circuit's application of the *Policy Interpretation* to program curtailments resulted in a finding of liability based solely on the difference between women's and men's athletic participation rates at CSU. This exclusive reliance purely on statistical dis-

proportion contradicts this Court's interpretation of section 2000e-2(j). In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), for example, the Court addressed a union's argument that statistical disproportion alone could not be the basis for liability under Title VII, noting that section 2000e-2(j) does not require statistical proportionality. The Court stated that although statistical evidence was relevant, "[section 2000e-(j)] makes clear that Title VII imposes no requirement that a work force mirror the general population." *Id.* at 339-40 n.20. Yet the Tenth Circuit decision, by imposing liability solely on the basis of the disproportionate athletic participation rates of men and women at CSU, does exactly that.

The *Teamsters* Court further noted that "evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants would also be relevant." *Id.* at 340. This observation, applied in the Title IX context, underscores the necessity for an inquiry into the "interests and abilities" of female and male college students, not just their raw enrollment statistics, given that the proportion of women and men "interested" in athletics may well differ from the percentages of women and men enrolled in the educational institution.[9]

This Court also addressed this issue in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), where it held that statistical evidence showing a high percentage of nonwhite workers in an employer's nonskilled jobs and a low percentage of nonwhite workers in the same employer's skilled jobs was not sufficiently probative to make out a prima facie case of employment discrimination. The Court explained that the relevant comparison was "between the racial composition of the qualified persons in the

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[9] This is one basis for amici's belief that the decision in *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993), also is incorrect. There, the First Circuit rejected Brown's argument that athletic opportunities should be provided in proportion to the percentage of female and male students expressing interest in athletics, not in proportion to the percentage of women and men in the student body as a whole.

labor market and the persons holding at-issue jobs," *id.* at 650, and that the employer could not be held liable "[i]f the absence of minorities holding such skilled positions [wa]s due to a dearth of qualified nonwhite applicants (for reasons that are not petitioners' fault)." [10] *Id.* at 651.[11]

Similarly, to the extent that the proportion of women among the athletes at a particular school is lower than the proportion of women in that school's student body, the disproportion cannot be assumed to be the school's "fault," or the result of discrimination, and it may not be used by itself to find the school liable for a Title IX violation. Just as it cannot be assumed that all members of a given population group are qualified for a job, it cannot be assumed that every student in a university community has the interest to participate in intercollegiate athletics.

Section 2000e-2(j) also provides guidance concerning the extent to which race- or gender-conscious remedies may be adopted voluntarily or imposed by courts. As the interpretive memorandum to section 2000e-2(j) explains, "[t]here is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance . . . would involve a *violation* of title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race." 110 Cong. Rec.

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[10] Similarly, in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), a plurality of this Court noted that "[i]t is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces." *Id.* at 992 (citation omitted).

[11] Congress amended Title VII in 1991 in response to two other sections of the Supreme Court's decision in *Wards Cove* concerning proof of causation under Title VII and the employer's burden once plaintiff has established a prima facie case. *See* 42 U.S.C. § 2000e-2(k). This amendment did not affect the holding discussed here.

7213 (1964) (emphasis supplied). Citing section 2000e-2(j), the Court in *Wards Cove* similarly remarked that if pure statistical imbalance were enough to make out a prima facie case of employment discrimination, employers would be tempted to adopt "numerical quotas in the workplace, a result that Congress and this Court have rejected repeatedly in the past." 490 U.S. at 653. Such "inappropriate prophylactic measures," as several members of this Court have warned, clearly would violate section 2000e-2(j). *Watson v. Fort Worth Bank & Trust,* 487 U. S. 977, 992 (1988) (plurality opinion). *See also Price Waterhouse v. Hopkins,* 490 U.S. 228, 275 (1989) (disapproving liability standards that would provide an "incentive to preferential treatment in violation of Section 2000e-2(j)") (opinion of O'Connor, J.).

Yet the Tenth Circuit decision would not merely encourage such quotas; it would require them. Under the Tenth Circuit's approach, only equal participation ratios can save a university from a finding of liability under Title IX when it is forced, for financial reasons, to curtail the size of its athletic programs.

Although it is clear that Title VII does permit race- or gender-conscious relief as a remedy for past discriminatory practices, *see Local 28, Sheet Metal Workers' Internat'l Ass'n v. Equal Employment Opportunity Comm'n,* 478 U.S. 421 (1986), it is equally clear that such remedies may not be imposed in the absence of any finding of discrimination. Just as "an employer would not violate the statute merely by having a racially imbalanced work force," a court "could not order an employer to adopt racial preferences merely to correct such an imbalance." *Id.* at 453. Nonetheless, that is precisely what the Tenth Circuit has ordered in this case. Based solely on a statistical difference in participation rates, the Tenth Circuit has ordered CSU to immunize women's athletics from any cuts until pure statistical proportionality is reached. Under this injunction, none of the 120 varsity participation opportunities for women (who make up 48.2 percent of CSU's total enrollment) may be eliminated until CSU

has eliminated 68 of the currently existing 198 varsity participation opportunities for men and has thus arrived at perfect statistical proportionality of athletic participation to enrollment.[12] Such a draconian result would be impermissible in the employment context under section 2000e-2(j), and it is likewise unacceptable under section 1681 (b) of Title IX.

Indeed, the Tenth Circuit's requirement that *only* men's athletic programs be eliminated until statistical balance is achieved is too harsh to stand even where there is a finding of discrimination. Remedial plans, whether voluntary or court-imposed, are permissible only to the extent that they do not "unnecessarily trammel[] the rights of male employees or create[] an absolute bar to their advancement." *Johnson v. Transportation Agency*, 480 U.S. 616, 637-38 (1987); *accord, Local 28, Sheet Metal Workers*, 478 U.S. at 479. If the Tenth Circuit's result in this case does not "unnecessarily trammel" the rights of male athletes at CSU, or does not "create an absolute bar to their advancement," it is hard to imagine what could.

The *Johnson* Court cautioned against blind reliance on numbers without consideration of qualifications:

> If [an affirmative action] plan failed to take distinctions in qualifications into account in providing guidance for actual employment decisions, it would dictate mere blind hiring by the numbers, for it would hold supervisors to "achievement of a particular percentage of minority employment or membership . . . regardless of circumstances such as economic conditions or the number of available qualified minority applicants . . . ."

480 U.S. at 636 (citation omitted). Rather than "blind *hiring* by the numbers," what the court below has ordered is essentially "blind *firing* by the numbers," since the order requires the systematic elimination of men's athletic opportunities until statistical proportionality is achieved be-

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[12] *See Roberts*, 814 F. Supp. at 1512, 1514-15; Pet. App. at A-7, A-12.

fore a single women's athletic position may be cut. This is impermissible.

As this Court has made clear, "distinctions in actual qualifications" (or, in the Title IX context, distinctions in "interests and abilities") must be taken into account, both in determining liability and in formulating a remedy. By refusing to take interests and abilities into account, the decision below reads section 1681(b) out of Title IX and conflicts with prior holdings of this Court concerning section 2000e-2(j).

III. TITLE IX MUST BE INTERPRETED TO AVOID THE SERIOUS EQUAL PROTECTION PROBLEMS RAISED BY THE LOWER COURT'S DECISION.

The court below interpreted Title IX to require a harsh result: that only men's athletic opportunities at CSU may be cut until pure statistical proportionality between male and female athletic participation at CSU is achieved. This interpretation raises serious constitutional problems, and this Court should construe the statute to avoid such problems. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council,* 485 U.S. 568, 575 (1988).

Since the statute, as construed and applied by the Tenth Circuit, discriminates on the basis of gender by permitting cuts only in men's athletic programs, it can pass constitutional muster only if it serves "important governmental objectives" and if the "discriminatory means employed" are "substantially related to the achievement of those objectives." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). This Court's prior decisions in similar cases make clear that the Tenth Circuit's interpretation of Title IX cannot survive such scrutiny.

In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), the case most closely on point, the Court considered the constitutionality of a provision in a collective bargaining agreement that provided for preferential protection from layoffs for minority schoolteachers. Specifically, in the event that layoffs became necessary, the

provision required that the proportion of minority to nonminority teachers be preserved, even if nonminority teachers who had accumulated greater seniority than some minority teachers would have to be laid off. *See id.* at 270.

The Court held that this provision violated the Equal Protection Clause, U.S. Const. amend. XIV. The plurality gave two reasons for this conclusion. First, the interests and purposes advanced to justify the racial classification were insufficient, because they consisted mostly of general recitals of societal discrimination and statistics showing that the percentage of minority teachers was smaller than the percentage of minority students in the district. The Court held that neither vague recitals nor statistical imbalances, without more, were sufficiently compelling to warrant race-based "remedial" measures.[13] Here, the purposes and interests served by the gender classification are similarly vague; the Tenth Circuit's finding of a Title IX violation rests, as discussed in Part I above, purely on a finding of statistical difference, and not on a finding of discrimination. Such a justification is insufficient to support a rigid gender-based quota system of the kind the Tenth Circuit required.

The second reason the *Wygant* court struck down the layoff provision at issue in that case was that it "was not a legally appropriate means of achieving even a compelling purpose." *Id.* at 278. This was so in part because layoffs are a uniquely intrusive and burdensome method of achieving racial balance. The Court specifically indicated that, "[alt]hough hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose." *Id.* at 282. Here, the Tenth Circuit would require, in essence, "laying off" only

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[13] Similarly, in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Court found that a purportedly "remedial" minority preference program established by the city could not be justified on the basis of vague recitals of discrimination, or on the basis of statistical showings that few minority construction firms had been successful in gaining city contracts.

male athletes until gender proportionality is achieved.[14] This harsh result would violate the Equal Protection Clause just as the *Wygant* plan did.[15]

The Tenth Circuit's interpretation of Title IX is also constitutionally suspect because of its use of a rigid quota system as its "remedial" mechanism. The Court has long disfavored quota systems, even where the need for remedial measures is clear, because quotas pose virtually insurmountable barriers to the advancement of the individuals not granted preferential treatment. In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), for example, the Court observed that "[s]ince the city must

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[14] The fact that the "layoffs" here involve athletic opportunities, not jobs, is irrelevant; the distinction made by the Court in *Wygant* was between the *dilution* of opportunity resulting from affirmative action in hiring programs and the *denial* of opportunity resulting from layoffs: "In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally." 476 U.S. at 282 (emphasis in original). The nature of the deprivation suffered by male athletes whose athletic opportunities are to be cut under the Tenth Circuit's reading of Title IX should not be trivialized.

[15] *Metro Broadcasting, Inc. v. Federal Communications Comm'n* 497 U.S. 547 (1990), is not to the contrary. *Metro Broadcasting* involved minority preference policies adopted by the Federal Communications Commission with respect to the allocation of radio and television broadcast licenses. The Court gave considerable weight to the "scarcity of [electromagnetic frequencies]," noting that because of that scarcity

> ". . . the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." The Government's role in distributing the limited number of broadcast licenses is not merely that of a "traffic offier"; rather, it is axiomatic that broadcasting may be regulated in light of the rights of the viewing and listening audience and that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."

Id. at 566-67 (citations omitted).

Moreover, in *Metro Broadcasting* the minority preferences were in effect "hiring preferences," and did not require "laying off" any current holders of licenses.

already consider bids and waivers on a case-by-case basis, it is difficult to see the need for a rigid numerical quota." *Id.* at 508. Similarly, in *Regents of University of California v. Bakke,* 438 U.S. 265 (1978), the Court struck down the university's admissions quota system, but refused to enjoin the university from ever considering the race of an applicant as part of its admissions program.

Where, as here, a particular interpretation of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless the constitutional construction is plainly contrary to the intent of Congress. *See, e.g., Edward J. DeBartolo Corp.,* 485 U.S. at 575 (because National Labor Relations Board's construction of the National Labor Relations Act to proscribe peaceful handbilling raised serious First Amendment issues, Court would construe statute so as not to forbid such handbilling); *National Labor Relations Bd. v. Catholic Bishop,* 440 U.S. 490, 499-501 (1979). This Court therefore should grant certiorari in this case in order to ensure that Title IX is not construed in an unconstitutional manner.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

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November 3, 1993

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No. 93-559

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

COLORADO STATE BOARD OF AGRICULTURE, in its capacity as the governing board of the Colorado State University,

Petitioner,

v.

JENNIFER ROBERTS, JULIE OSBORNE, JANET BRUMBELOW, LAURA BIELAK, SARA STOUT, AMY RECOUPER, JENNIFER JACOBS, MALIA KUENZLI, STACIE STAFFORD, HEATHER NAKASONE, KIM JOHNSON, AIMEE RICE AINSWORTH, and LISA MIZE, in their individual capacities,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTIONS PRESENTED

1. Whether a violation of Title IX's regulations as interpreted by the enforcing agency states a violation of the Act.

2. Whether the court of appeals properly held that the district court did not abuse its discretion in providing a remedy for the specific violation of law that it found.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-559

COLORADO STATE BOARD OF AGRICULTURE, in its capacity as the governing board of the Colorado State University,

Petitioner,

v.

JENNIFER ROBERTS, JULIE OSBORNE, JANET BRUMBELOW, LAURA BIELAK, SARA STOUT, AMY RECOUPER, JENNIFER JACOBS, MALIA KUENZLI, STACIE STAFFORD, HEATHER NAKASONE, KIM JOHNSON, AIMEE RICE AINSWORTH, and LISA MIZE, in their individual capacities,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In a carefully reasoned decision fully consistent with all applicable law, the Tenth Circuit panel[1] unanimously affirmed the district court's[2] fact-specific holding that respondents' individual rights guaranteed under Title IX of the Education Amendments of 1972[3] had been violated

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[1] McKay, C. J., Anderson, J., and opinion by Logan, J.

[2] Weinshienk, J. (D. Colo.).

[3] 20 U.S.C. §§ 1681-87 (1988). Petitioner properly concedes that it is subject to the requirements of Title IX. Pet. 3.

and that respondents were entitled to the reinstatement of their softball team. Only the narrow and factually-driven questions of whether respondents were discriminatorily denied the opportunity to participate in varsity athletics at Colorado State University (CSU), and, if so, whether they were entitled to the reinstatement of their team, are presented. This case does not involve the myriad of other questions that petitioner asks this Court to consider, such as whether a university is required to maintain statistical parity in its men's and women's athletic programs, or whether a university that has a gender imbalance in its athletics programs may ever eliminate a women's team. Moreover, notwithstanding petitioner's invocation of numerous extra-record facts and broadly drawn and inapposite policy arguments, this petition is a wholly inappropriate vehicle and seeks a wholly inappropriate forum for the referendum on the politically-charged issue of gender equity in intercollegiate athletics which petitioner apparently proposes.

In June of 1992, CSU and the Colorado State Board of Agriculture (SBA) terminated the women's varsity intercollegiate softball program and the men's baseball team.[4] Respondents, female students at CSU who were members of the softball team, filed suit in their individual capacities on June 29, 1992, in United States District Court for the District of Colorado, seeking reinstatement of the women's varsity softball program. Respondents asserted claims under Title IX and its implementing regulations to challenge the intentionally discriminatory denial of their right to an equal opportunity to participate in varsity intercollegiate athletics.[5]

[4] For the reasons discussed below, the termination of baseball did not constitute a defense to the finding of discrimination. *See infra* at 4-5.

[5] Petitioner is incorrect in asserting that "[r]espondents did not allege intentional discrimination." Pet. 6. *See* Second Am. Compl. at 2 (alleging that CSU "has engaged in a past and con-

After hearing all of the evidence at trial, the district court found CSU's athletic program in violation of Title IX and the athletics regulation, 34 C.F.R. § 106.41, and ordered CSU and SBA to reinstate the varsity women's softball program. Pet. App. A-20 - A-21. The district court first carefully analyzed the regulatory framework of Title IX, beginning with the athletics regulation promulgated by the Department of Education. According proper deference to the enforcing agency's interpretation of its own regulation, *see infra* at 13 n.16, 18, the district court held that the controlling standard is "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes," 34 C.F.R. § 106.41(c), and that discrimination in this area alone constitutes a violation of Title IX. Pet. App. A-4 - A-5.

The district court then adopted the three-part test for compliance with the athletics regulation set forth in the enforcing agency's official interpretation of the regulation:

> 1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
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> 2) Where the members of one sex have been and are under-represented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
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> 3) Where the members of one sex are under-represented among intercollegiate athletes, and the insti-

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tinuing pattern and practice of knowingly and intentionally discriminating against plaintiffs on the basis of sex . . . ."). Indeed, the petition is replete with incorrect statements of the record and mischaracterizations of the decisions below. Respondents will only address those misstatements and mischaracterizations which are relevant to the issues before the Court.

> tution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of that sex have been fully and effectively accommodated by the present program.

Pet. App. A-5 (quoting *Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71413, 71418 (1979) (hereinafter, Policy Interpretation)).

Based on the record evidence, the district court found that CSU did not meet any of the requirements of the three-prong test. The district court first found that the plaintiffs had met their burden of proving that CSU did not provide intercollegiate athletic opportunities for female students in numbers substantially proportionate to their enrollment.[6] During the 1992-1993 school year, women athletes were 37.7% of total CSU varsity athletes, while female enrollment was 48.2% of the undergraduate student population, resulting in a disparity of 10.5%. Pet. App. A-7.[7] Relying on the governing law and the statistical evidence presented at trial, the district court concluded that female athletic participation at CSU was not substantially proportionate to female enrollment either before or after the termination of softball in 1992. *Id.* at A-9.

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[6] The relevant inquiry under this test is the number of participation opportunities provided by CSU, and not, as petitioner suggests, the number of teams sponsored. Pet. 4-5. Because of obvious differences among sports, the number of teams sponsored for each sex is not indicative of relative participation opportunities. *Cf.* Policy Interpretation, 44 Fed. Reg. at 71422 (explaining that the agency's rejection of team-based comparisons was based on the unfairness of comparing large participation sports, such as football, to smaller ones, such as women's volleyball).

[7] Indeed, women's share of intercolleg.ate athletic participation had actually declined since 1980. Pet. App. A-6. By limiting its review of CSU's historical participation data to 1988-1989, Pet. 5 n.5, 6, petitioner presents a selective and self-serving view of the record.

The district court then found that CSU had failed to show a history and continuing practice of program expansion responsive to women. Giving the language in the Policy Interpretation its plain meaning, the district court rejected CSU's argument that the creation of a women's athletic program during the 1970s demonstrated the requisite program expansion because such an interpretation would "render meaningless Title IX's regulations and its Policy Interpretation," and "implicitly condone the attitude that female athletes at CSU should be satisfied with their current opportunities given the pre-1970 lack of participation opportunities for women in intercollegiate athletics." Pet. App. A-11. Similarly, the marginal increase in women's share of participation effected through the 1992 reductions of both baseball and softball did not establish program expansion. Rather, as the court explained, "CSU must either demonstrate actual expansion in women's athletic programming or establish that it has considered and improved upon the under-represented status of women athletes when reductions in athletic programs became necessary in the past." *Id.* at A-12. By finding that CSU had actually eliminated more athletic opportunities for women than for men over the last twelve years, the district court concluded that CSU could not demonstrate program expansion. *Id.* at A-12 - A-13.

The district court then made the factual finding that CSU's existing athletic program did not fully and effectively accommodate the interests and abilities of its female students. Pet. App. A-19 - A-20. The district court based this ruling on the substantial interest and ability in softball on the part of the plaintiffs, the recent success of the women's varsity softball team and the growing popularity of women's softball in Colorado and nationwide. *Id.* at A-16 - A-19.

The district court rejected CSU's proffered defenses that the termination of the softball program was accept-

able because it was motivated by budgetary concerns,[8] and that CSU had not intended to violate the law. The district court held that financial constraints are not a defense to a Title IX claim. Pet. App. A-20. Further, the court recognized that a specific intent to discriminate or to violate the law is not necessary to violate Title IX. *Id.* Moreover, the district court categorically rejected, as a factual matter, CSU's contention, restated here, Pet. 4-5, that it could not have intended to violate the law because it relied in good faith on the Department of Education Office for Civil Rights' (OCR) approval of its athletics program in 1989. The district court reviewed both the history of CSU's treatment of female athletes during the preceding decade and a series of OCR investigations and decisions regarding such treatment, and resolved the disputed factual questions. Pet. App. A-10-A-14. It then concluded "that lower participation rates and decreasing participation opportunities for women are not indicators of a good faith effort on behalf of defendants to increase athletic opportunities for female student athletes at Colorado State University."[9] *Id.* at A-15.

The district court issued a permanent injunction requiring CSU and SBA to reinstate women's softball as a varsity sport.[10] Contrary to petitioner's assertions, the

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[8] Petitioner's repeated characterization of the decision to cut softball as motivated by budgetary concerns, Pet. 3-4, 9, has no basis in the record. There is no factual support for the proposition that CSU's budgetary constraints necessitated cutbacks in women's participation opportunities generally, or softball specifically. Rather, the evidence in the record revealed that CSU allocated the lion's share of its athletic budget (77%) to the men's athletic program. Tr. at 637 (testimony of Corey Johnson, athletic director at CSU).

[9] In light of this finding, petitioner's assertion that the district court "refused even to consider evidence of CSU's good faith," Pet. 9, is incorrect.

[10] In direct response to CSU's noncompliance with the permanent injunction reinstating the team, at a status conference on March 11, 1993, the court specifically ordered CSU to hire a coach, begin

court's order in no way requires petitioner to "permanently . . . reinstate the women's softball program." Pet. 9. Rather, the court based its remedy on the "underlying mandate . . . that CSU may not continue to operate an intercollegiate athletic program that provides a disproportionate amount of participation opportunities to male athletes where there is no evidence of continuing program expansion or effective accommodation of the interests and abilities of its female students." Pet. App. A-20 - A-21.

The Tenth Circuit Court of Appeals unanimously affirmed the district court's findings of fact and conclusions of law.[11] First, consistent with interpretations of every court which has considered the issue and the enforcing agency, the Tenth Circuit held that "an institution may violate Title IX simply by failing to accommodate effectively the interests and abilities of student athletes of both sexes." Pet. App. C-7 - C-8. Second, the Tenth Circuit held that the three-part test adopted by OCR is the governing standard for determining compliance with Title IX, noting its obligation to "defer substantially to an agency's interpretation of its own regulations," particularly where, "as here, they are effectively legislative, pursuant to a statutory delegation." *Id.* at C-8.

The Tenth Circuit affirmed the district court's factual finding that plaintiffs demonstrated a substantial disproportion between women's athletic opportunities and enrollment, and held that "[t]he fact that many or even most other educational institutions have a greater imbalance

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the recruiting process and schedule a fall exhibition season. *See* Pet. App. B-3 (". . . it has been many years since I've had a party attempt to . . . stonewall a court order the way that this has been done in this case").

[11] The court of appeals reversed only the very narrow portion of the district court's March 11, 1993, order which required CSU to schedule a fall softball exhibition season on the grounds that the court had exceeded its authority. Pet. App. C-22 - C-23.

than CSU does not require a different holding." Pet. App. C-12. It also affirmed the district court's finding that CSU had failed to establish a history and continuing practice of program expansion where women's athletic opportunities had declined steadily during the 1980s and more women's than men's opportunities had been eliminated, stating "[t]he facts as found by the district court (and largely undisputed by defendant) can logically support no other conclusion . . . ." *Id.* at C-13. In so ruling, the Tenth Circuit concluded that "the ordinary meaning of the word 'expansion' may not be twisted to find compliance under this prong when schools have increased the relative percentages of women participating in athletics by making cuts in both men's and women's sports programs." *Id.* Turning to the third prong of the test, the Tenth Circuit affirmed the district court's finding that CSU's existing program did not fully and effectively accommodate the interests and abilities of female athletes based on the "extensive findings" of the district court with respect to the interests and abilities of CSU softball players and the feasibility of fielding a successful team.[12] *Id.* at C-15.

The Tenth Circuit, like the district court, rejected the argument that intent is necessary to establish a violation of the Title IX athletics regulation, relying on *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983). The Tenth Circuit found further support for this ruling in Title VII of the Civil Rights Act of 1964, noting that a showing of intent is not necessary to prove a violation of Title VII. Pet. App. C-17 - C-18.

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[12] Although the Tenth Circuit held that the district court had erred in placing the burden of proof on defendant with respect to this part of the test, it upheld the district court's finding of unaccommodated interest and ability based on the "more than adequate" evidence in the record. Pet. App. C-15. Contrary to petitioner's assertions, the court in no way held that terminating a women's team "automatically" establishes unaccommodated interests and abilities. Pet. 12.

Finally, the Tenth Circuit upheld the reinstatement of varsity women's softball as an appropriate remedy for the violation proven and within the discretion of the district court. The Tenth Circuit carefully distinguished between class actions and lawsuits brought by individual plaintiffs for the purposes of selecting an appropriate remedy, and concluded that the district court properly provided plaintiffs with individual relief tailored to the harm they sustained. Pet. App. C-19 - C-22. The Tenth Circuit also explained that the district court's order does not require CSU to permanently sustain a varsity softball team, as the relief runs to plaintiffs individually and is predicated on CSU's underlying violation of Title IX. *Id.* at C-21 - C-22.

Petitioner mischaracterizes the decision below in several key respects. First, petitioner inaccurately describes the Tenth Circuit as ruling that "a statistical imbalance *can* violate Title IX." Pet. 11 (emphasis in original). To the contrary, the Tenth Circuit carefully explained and held that a statistical imbalance between women's athletic participation and enrollment alone does not violate Title IX.[13] Pet. App. C-9 - C-11, C-14. Rather, substantial proportionality between women's athletic participation and enrollment is only a "safe harbor" which relieves institutions from any obligation to show continuing program expansion or to fully and effectively accommodate the

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[13] As the court of appeals clearly explained, a violation occurs only where such a disparity exists *and* the institution cannot show a continuing history of program expansion for women, *and* the plaintiffs demonstrate that women's athletic interests and abilities are not fully and effectively accommodated by the existing program. Pet. App. C-9, C-11 n.6, C-14. Moreover, even where all of these conditions exist, an institution may nevertheless decline to create or upgrade a team if there is not a reasonable expectation of competition for that team within the institution's normal competitive region. *Id.* at C-14.

interests and abilities of members of the underrepresented sex. *Id.* at C-9.

Second, there is no basis for petitioner's assertion that "the current rule in the Tenth Circuit" is that "no school which has not achieved strict proportionality may never [sic] discontinue a women's program for any reason." Pet. 12. Nothing in the court's ruling prevents a university which does not provide substantially proportionate athletic opportunities from terminating a women's team where sufficient interest and ability do not exist to sustain the team, where there are not sufficient competitive opportunities in the institution's normal competitive region, or where, as a result of other changes in the program, which could include cut-backs in the women's program, women's athletic participation becomes substantially proportionate to enrollment. Pet. App. C-13 - C-14.

Third, petitioner's characterization of the Tenth Circuit's holding with respect to the three-part test as establishing "an irrebuttable presumption" of a Title IX violation, Pet. 11, misrepresents both the test and the Tenth Circuit's decision. To the extent that petitioner refers to the first prong of the test as creating an *"irrebuttable* presumption" of discrimination based upon a statistical imbalance, Pet. 20 n.24, petitioner is plainly mistaken for the reasons explained above. *See supra* at 9 n.13. To the extent that petitioner describes the three-part test in its entirety as establishing an "irrebuttable presumption" of discrimination, Pet. 11, such a description is inapposite. A test which itself incorporates three independent, complete defenses to liability can hardly be described as an irrebutable presumption.

REASONS FOR DENYING THE WRIT

This case conflicts neither with the law in the circuits nor with any decisions of this Court, contrary to petitioner's assertions. Rather, the Tenth Circuit's decision is in full accord with this Court's admonition that "[t]here is no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.'" *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (citations omitted). Further, this case does not present the question of whether the gender composition of a university's athletic program must mirror that of its student body. The finding of liability was not predicated upon such an assumption and the relief ordered did not mandate such a result. Finally, petitioner's suggestion that nothing less than the future of college athletics is at issue in this case materially overstates the significance of the Tenth Circuit's decision to reinstate a single softball team for individual respondents. Further review of this case is not warranted.

I. THE DECISION OF THE TENTH CIRCUIT IS IN ACCORD WITH ALL OTHER RELEVANT DECISIONS

The body of law which has developed regarding Title IX's prohibition of sex discrimination in intercollegiate athletics is consistent and in accord with the Tenth Circuit's decision in this case. *See Cohen v. Brown Univ.*, 809 F. Supp. 978 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993); *Favia v. Indiana Univ. of Penn.*, 812 F. Supp. 578 (W.D. Pa.), *mot. to modify order denied*, No. 93-3051, 1993 WL 405209 (3rd Cir. Oct. 13, 1993); *Cook v. Colgate Univ.*, 802 F. Supp. 737 (N.D.N.Y. 1992), *vacated as moot*, 992 F.2d 17 (2d Cir. 1993).[14]

[14] The Magistrate Judge's analysis in *Cook* diverges in certain respects from that in other decisions, in particular by incorporating a sport-specific comparison of individual men's and women's teams and by adopting a Title VII-based burden of proof standard

Nonetheless, petitioner contends that the decision of the Tenth Circuit conflicts with other law in two regards. First, petitioner argues that there is a conflict regarding the question of whether Title IX prohibits only intentional discrimination or whether it also extends to disparate impact discrimination. Second, petitioner claims that the Tenth Circuit's affirmation of the district court's order reinstating the softball team conflicts with the First Circuit's holding that, in the very different context of a class action, the defendant university should have the opportunity first to present a remedial plan to the court. A review of each of these issues demonstrates conclusively that there is no conflict of authority.

A. Title IX's Prohibition Is Not Limited To Intentional Discrimination And, In Any Event, The Discrimination At Issue In This Case Was Intentional

1. *The Tenth Circuit's Decision Is In Full Accord With This Court's Decision In* Guardians *And All Other Controlling Authority*

The Tenth Circuit's conclusion that intent is not a necessary element of a Title IX athletics violation, Pet. App. C-18, is in full accord with all controlling authority. *See, e.g., Favia*, 812 F.Supp. at 584; *Cook*, 802 F. Supp. at 741; *Haffer v. Temple Univ.*, 678 F. Supp. 517, 539-40 (E.D. Pa. 1987); *cf. Pfeiffer v. Marion Ctr. Area Sch.*

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for determining whether there is a violation of Title IX. *Cook*, 802 F. Supp. at 743. The sport-specific analysis departs from both the agency interpretation, Policy Interpretation, 44 Fed. Reg. at 71422, as well as that of the courts. Regarding the burden of proof question, a better reasoned approach is clearly that expressed by the First Circuit, *Cohen*, 991 F.2d at 901 ("there is no need to search for analogies where, as in the Title IX milieu, the controlling statutes and regulations are clear"), and implicitly adopted by the Tenth Circuit. Nonetheless, neither question is before this Court and, in any event, the Magistrate Judge's holding instating the women's ice-hockey team is entirely consistent with the other decisions, including that of the Tenth Circuit.

Dist., 917 F.2d 779, 788 (3d Cir. 1990). Because Title IX was modeled on Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d,[15] *see Grove City College v. Bell*, 465 U.S. 555, 566 (1984); *Cannon v. University of Chicago*, 441 U.S. 677, 694-96 (1979), these courts have properly relied on this Court's analysis of the same question regarding the necessary showing of intent in the Title VI context. This Court's decision in *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983), the controlling Title VI case, is fully dispositive.

In *Guardians*, this Court, as it subsequently explained, held that while "Title VI itself directly reached only instances of intentional discrimination, . . . actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI." *Alexander v. Choate*, 469 U.S. 287, 293 (1985) (footnotes omitted). Like Title VI, Title IX explicitly delegates to the enforcing agency the authority to issue implementing rules and regulations. *Guardians*, 463 U.S. at 591 n.12 (Title VI); 20 U.S.C. § 1682 (1988) (Title IX). As a result, the agency's interpretation of Title IX, including "the complex determination of what sorts of disparate impacts upon [women] constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts," *Alexander*, 469 U.S. at 293-94, is entitled to the same deference extended under Title VI.[16]

[15] Because of the unique relationship between Title IX and Title VI, there is no support for petitioner's assertion that the application of *Guardians* to this case raises "broad" and "recurring" questions regarding agency authority to promulgate regulations. Pet. 17-18.

[16] Indeed, Title IX's subsequent history supports even greater deference to the Title IX regulations. In 1974, Congress specifically instructed the Department of Health, Education and Welfare (the enforcing agency at the time) to promulgate regulations implementing Title IX, including its prohibition against discrimination in

Accordingly, at the very least, a violation of Title IX's regulations—upon which this action is explicitly based—need not be predicated upon a showing of intent.[17] A simple reading of the athletics regulation, 34 C.F.R. § 106.41, demonstrates that it does not limit its reach to intentional discrimination. *See, e.g., Haffer*, 678 F. Supp. at 517.

The only court to have reached a contrary conclusion regarding Title IX's coverage of intentional discrimination, and which provides the sole support for petitioner's contention that there is a conflict of law on this subject, asked the proper question, i.e., whether Title VI reaches only intentional discrimination, but without the benefit of this Court's analysis in *Guardians*, reached the wrong conclusion. In *Cannon v. University of Chicago*, 648 F.2d 1104 (7th Cir.), *cert. denied*, 454 U.S. 1128 (1981), which was decided before *Guardians*, the Seventh Circuit concluded that Title VI prohibited only intentional dis-

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intercollegiate athletics. Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974). Under pre-existing law, Congress had the authority to disapprove such regulations. *See North Haven*, 456 U.S. at 531-32. Although it held extensive hearings on the regulations, and resolutions of disapproval were introduced, Congress did not disapprove the Title IX regulations, and they took effect on July 21, 1975. *Id.* at 533; *see also* Policy Interpretation, 44 Fed. Reg. at 71413. This postenactment history, which shows that Congress was aware of the Department's interpretation and the controversy regarding it, not only constitutes a second express delegation of regulatory authority but also "lends weight to the argument that [the regulatory] coverage" of athletics was intended. *North Haven*, 456 U.S. at 534 (upholding Title IX's employment regulations which had also been the subject of controversy).

[17] Indeed, Title IX itself may extend to disparate impact discrimination. *Cf. Alexander*, 469 U.S. at 294 n.11 (suggesting that the first part of the *Guardians* holding might not apply to cases brought under § 504 of the Rehabilitation Act, 29 U.S.C. § 794, which, like Title IX, was modeled on Title VI, because the Court's reasoning in *Guardians* was constrained by factors unique to Title VI).

crimination, drawing no distinction between Title VI and its regulations. *Id.* at 1108. It then relied on this conclusion for its holding that Title IX prohibited only intentional discrimination. *Id.* at 1109. Given this Court's different conclusion in *Guardians*, *Cannon* is no longer of any persuasive value on this issue and cannot create a conflict in the law that should be resolved by this Court.[18]

Moreover, this Court's decision in *Franklin v. Gwinnett County Pub. Sch.*, 112 S. Ct. 1028 (1992), constitutes an "implicit acknowledgment," *id.* at 1039 (Scalia, J., concurring), that Title IX's prohibition extends beyond intentional discrimination. *Franklin*'s conclusion "that a money damages remedy is available under Title IX for an intentional violation," *id.* at 1038 n.8, necessarily assumes that intent is not a necessary element of a Title IX violation. If Title IX only reached intentional violations, there would have been no need for the limitation of the damages remedy to cases of intentional discrimination. *Cf.* Pet. App. C-18 n.13.[19]

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[18] Petitioner's suggestion that the First Circuit has taken an approach between the Seventh and Tenth Circuits on this issue, Pet. 16, is based on a misreading of both the Tenth Circuit's decision in this case and the First Circuit's decision in *Cohen*. As recognized by petitioner, Pet. 16, the First Circuit concluded that, in order for there to be a Title IX violation, statistical evidence must be accompanied by "further evidence of discrimination, such as unmet need amongst the members of the disadvantaged gender." *Cohen*, 991 F.2d at 895. This formulation is virtually identical to, and in fact forms the express basis for, the Tenth Circuit's holding that a Title IX "plaintiff must not only show that the institution fails on the first benchmark of substantial proportionality but also that it does not fully and effectively accommodate the interests and abilities of its women athletes. *See Cohen*." Pet. App. C-14 (citation omitted). There is no disagreement at all between the First and Tenth Circuits on this point.

[19] In this regard, it is instructive that, as petitioner properly notes, Pet. 5 n.7, respondents' monetary damages claims which, of course, were dependent upon a showing of intentional discrimination, have been voluntarily settled.

There is no conflict of law on the question of whether intent is a necessary element of a Title IX claim.[20]

2. *The Tenth Circuit Properly Applied* Guardians *To This Case*

Petitioner also argues that *Guardians* should not be applied to this case because Title IX, including its athletics regulation, differs from Title VI and its regulatory framework in certain material respects. These arguments are without merit.

First, petitioner contends that the presence of 20 U.S.C. § 1681(b) distinguishes Title IX from Title VI and stands for the proposition that intent is a necessary element of a Title IX claim. Pet. 18. While, to be sure, there is no corollary provision in Title VI, this position is plainly wrong. Section 1681(b) was modeled on § 703(j) of Title VII, 42 U.S.C. § 2000e-2(j). *See* 1972 *U.S. Code Cong. & Admin. News* 2590-92 (1972) (Additional Views); *see also* 117 Cong. Rec. 39261-62 (1971) (remarks of Rep. Quie).[21] Section 703(j) has not stood in

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[20] The Tenth Circuit's use of Title VII analysis to further elucidate the requirements of Title IX is, contrary to the suggestion of petitioner, Pet. 16, consistent with this Court's precedent. *See Franklin*, 112 S. Ct. at 1037 (citing the seminal Title VII decision in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986), in support of the conclusion that Title IX likewise prohibits sexual harassment).

[21] Section 1681(b) provides:

> Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federal supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area:
>
> *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this

the way of over twenty years of jurisprudence applying Title VII to disparate impact cases. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988). The result must be the same for Title IX.[22]

Second, petitioner argues that *Guardians* only stands for the proposition that deference should be extended to an agency's regulations and that, therefore, the Tenth Circuit's reliance on the enforcing agency's Policy Interpretation was improper. Pet. 19. To begin with, the legislative delegation in 20 U.S.C. § 1682 is not limited to formal regulations, but is more broadly framed, authorizing the enforcing agency "to effectuate the provisions of section 1681 of this title . . . by issuing rules, regulations, or orders of general applicability."

Moreover, the Tenth Circuit, along with every other court which has addressed the issue, looked to the Policy

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chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

This section differs in principal part from § 703(j) by the inclusion of the proviso which specifically permits the use of statistical evidence in the proof of discrimination. Section 703(j) has no comparable provision.

[22] Moreover, Title VI's failure to include a corollary provision does not create an inference that *Guardians* should not be applied to Title IX. In *United Steelworkers v. Weber*, this Court explained that there is no analog to Title VII's 703(j) in Title VI because unlike Title VI, Title VII "was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments." 443 U.S. 193, 206 n.6 (1979). That is, because Title VI is limited by constitutional constraints, *University of Cal. Regents v. Bakke*, 438 U.S. 265 (1978), a provision such as § 703(j), or Title IX's § 1681(b), would be redundant. It is not necessary to reach here the question of whether Title IX is more like Title VI or Title VII in this regard, *see Franklin*, 112 S. Ct. at 1038 n.8 (declining to decide which constitutional power Congress relied on in enacting Title IX), because in either event, intent is not a necessary element of a violation of Title IX's regulations.

Interpretation, not as an independent source of authority, but as the enforcing agency's interpretation of its own regulations. Pet. App. C-8. Because the Policy Interpretation is an agency interpretation which, itself, was published following an extensive notice and comment procedure, and as one that has existed unchanged for fourteen years, surviving two subsequent amendments to Title IX,[23] as well as the Department of Education's recodification of the Department of Health, Education and Welfare's regulations pursuant to which it was initially promulgated, the Tenth Circuit properly recognized that it is due substantial deference. *Id.; accord Cohen*, 991 F.2d at 896-97 & n.10; *Williams v. School Dist. of Bethlehem, Pa.*, 998 F.2d 168, 171 (3d Cir. 1993). As this Court held in *North Haven Bd. of Educ. v. Bell*, in analyzing Title IX's employment regulations, "[i]n construing a statute, this Court normally accords great deference to the interpretation, particularly when it is longstanding, of the agency charged with the statute's administration." *North Haven*, 456 U.S. at 522 n.12 (citations omitted). The Tenth Circuit's reliance on the plain language of the regulation and the Policy Interpretation is fully in accord with this Court's decision in *Guardians*.[24]

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[23] *See* Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7 (abrogating states' Eleventh Amendment immunity under Title IX and other statutes); Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (reversing effect of this Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984)).

[24] Petitioner's argument that the agency did not intend its regulation to go beyond a prohibition of intentional discrimination is also unpersuasive. Pet. 19. Leaving aside the question of how the agency's decision regarding the structure of its regulations addressing affirmative and remedial action creates any inference on this subject at all, petitioner misstates the relevant history. The agency's decision not to adopt the proposed provision was made to achieve a uniform standard for affirmative and remedial efforts throughout the Title IX regulations rather than impose a special standard for athletics. As the comments accompanying the final rules explain, " 'affirmative efforts' [in athletics] *may still be required* pursuant to [the general affirmative action provision]

3. *The Discrimination At Issue In This Case Was Intentional*

Finally, even if Title IX and its athletics regulation were limited as suggested by petitioner, this case involves a straightforward example of intentional discrimination.[25] The question of whether or not Title IX extends beyond intentional discrmination is not presented.

The young women who brought this case as individual plaintiffs challenged the discriminatory treatment they suffered *as women* participating in a facially sex-segregated athletics program. It is well established that where gender discrimination results from such a facial, sex-based classification, intent is established as a matter of law. The question is not one of subjective motivation, as suggested by petitioner, Pet. 18,[26] but rather is determined by the very terms of the discrimination itself.[27] As this Court re-

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paragraph 86.3(a) [recodified as 34 C.F.R. § 106.41(a)]." *Department of Health, Education and Welfare, General Administration; Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefitting from Federal Financial Assistance*, 40 Fed. Reg. 24128, 24134 (June 4, 1975) (emphasis added).

[25] Respondents have alleged intentional discrimination in their complaint. *See supra* at 2 n.5.

[26] By confusing "motivation" with "intent," petitioner mistakes the relevant standard, even assuming a showing of intent is required. *Cf. Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) (finding liability for intentional discrimination under the Age Discrimination in Employment Act based on a facial classification without further proof of intent, but requiring knowledge or a reckless disregard that the challenged conduct will violate the law for an award of liquidated or "punitive" damages).

[27] Contrary to the implicit assumption of petitioner, *see e.g.*, Pet. 10, 13, 16, the mere use of statistical proof does not transform a claim of intentional discrimination into a disparate impact case. *See, e.g., International Bro. of Teamsters v. United States*, 431 U.S. 324, 339-40 (1977); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-308 (1977); *Village of Arlington Hts. v. Metropolitan Hous. Dev.*, 429 U.S. 252, 265 (1977); *cf.* 20 U.S.C. § 1681(b) (specifically permitting the use of statistical evidence in establishing a Title IX violation).

cently explained in *International Union, UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991):

> [T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicitly facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination. In *Martin Marietta*, [400 U.S. 542 (1971)], the motives underlying the employer's express exclusion of women did not alter the intentionally discriminatory character of the policy.

Id. at 1203-1204. Yet, the "malevolent motive" standard is precisely that which is urged by petitioner. Pet. 9. This position is without merit.

B. The Reinstatement Of The Softball Team In This Case Does Not Conflict With The Holding Of The First Circuit

Petitioner also urges this Court to hear this case to resolve an alleged conflict between the Tenth Circuit's affirmance of the district court's reinstatement of the softball team and the First Circuit's conclusion in *Cohen* that, upon a finding of liability, the defendant institution should, in the first instance, be permitted to fashion a remedial plan for the court's consideration. *Cohen*, 991 F.2d at 906. At the outset, the district court's issuance of injunctive relief is reviewed under the abuse of discretion standard, *Wright v. Council of City of Empora*, 407 U.S. 451, 470 (1972); Pet. App. C-4, and the Tenth Circuit properly affirmed the reinstatement of the softball team under this standard. Moreover, petitioner's argument that the relief issued in this case is inconsistent with that ordered by the First Circuit in *Cohen* disregards a fundamental and controlling difference between the two cases: the case at bar is an individual action brought by

plaintiffs in their individual capacities seeking relief only for their individual injuries, while *Cohen* is a class action brought pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, raising class-wide claims of liability and, by definition, seeking a class-wide remedy. Because the remedy in *Cohen*, of necessity, implicates Brown's entire athletic program, it is entirely appropriate to permit the offending institution to propose a remedy, although, of course, the court is not bound by such proposal.[28]

This case, on the other hand, is an individual action brought by individual plaintiffs whose sole interest is to obtain redress for their particular injury. As such, the remedy issued below is an unremarkable application of the long-standing principle, recently reaffirmed by this Court with specific regard to Title IX, that " 'where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' " *Franklin*, 112 S. Ct. at 1033 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). This Court recognized in *Franklin* that because "prospective relief [would] accord[ ] no remedy at all" to Christine Franklin, monetary relief was necessary to redress her injury. *Id.* at 1038. So, too, as the Tenth Circuit explained, the relief ordered in this case "directly responds to the harms plaintiffs have sustained, and the relief they have requested, as individuals." Pet. App. C-20.

Moreover, the order below is fully consistent with this Court's admonition, also in a Title IX case, that "the award of individual relief to a private litigant is not only sensible but is also fully consistent with—and in some cases even necessary to—the orderly enforcement of the statute." *Cannon*, 441 U.S. at 705-706. Respondents

[28] Because *Cohen* only addressed the question of remedy in a class action, there is no support for petitioner's suggestion, Pet. 22, that the First Circuit would apply the same rule in an individual action.

brought this case to vindicate their right to play softball; there is no other relief which could make them whole.[29] They have every right to relief tailored to their particular injury.[30] Indeed, as the Tenth Circuit recognized, "[h]ad the district court allowed defendant to devise its own plan for Title IX compliance, it would, in effect have been forcing plaintiffs to become unwilling representatives in a class action suit they chose not to bring." Pet. App. C-20.

Finally, petitioner materially overstates the breadth and impact of the order below, Pet. 22-23, as it recycles many of the same arguments that were rejected by the Tenth Circuit. As the Tenth Circuit explained in responding to precisely these arguments:

> [b]ecause this is not a class action, the broad sweep of the remedy exists only in defendant's imagination. . . . Only the CSU softball players have established that their athletic interests are not being accommodated effectively under Title IX. Therefore, relief is appropriate only for them. Moreover, because this relief runs to plaintiffs individually, defendant is incorrect in its assumption that CSU must sustain a softball team indefinitely. To the contrary, once all the plaintiffs in this case have transferred or graduated, defendant could return to court and seek to have the injunction dissolved.
>
> Further, because the reinstatement of the softball team is predicated upon defendant's Title IX viola-

[29] As the Tenth Circuit held, "insofar as defendant's continuing violation of Title IX operates to deprive plaintiffs of the opportunity to play softball, we believe monetary relief alone is inadequate." Pet. App. C-19.

[30] Petitioner is incorrect in asserting that no authority suggests that Title IX compliance "*ever* requires an educational institution to sponsor a team in any particular sport." Pet. 9 (emphasis in original). The Policy Interpretation requires precisely this result in certain circumstances when a particular sport is offered to members of one sex but not to members of the underrepresented sex. Policy Interpretation, 44 Fed. Reg. at 71418.

> tion, if that violation were remedied in accordance with either of the other two benchmarks of the effective accommodation test defendant would then no longer be obligated to maintain its softball program. If, for example, defendant chose to cut its athletic programs in such a way as to meet the substantial proportionality benchmark, plaintiffs would have no basis for asserting their right to play softball.

Pet. App. C-20 - C-21 (citations omitted).

Two other circuit court decisions strongly support the Tenth Circuit's conclusion that the district court's remedy was a limited one, well within the proper exercise of its discretion. In *Cook v. Colgate Univ.*, the Second Circuit vacated the lower court's order instating a women's ice hockey team as moot upon the graduation of all of the plaintiffs. *Cook*, 992 F.2d at 17.[31] In addition, and in the context of a class action, the Third Circuit carefully considered the impact of the changed circumstances doctrine as it applied to the offending institution's request to modify the district court's injunction reinstating two particular teams upon a finding of discrimination. *Favia*, 1993 WL 405209, at *6-9. There is no support for petitioner's assertions regarding the nature of the remedy ordered in this case.

II. BECAUSE THE TENTH CIRCUIT NEITHER HELD THAT THE GENDER COMPOSITION OF CSU'S ATHLETIC PROGRAM MUST MIRROR THAT OF ITS STUDENT BODY, NOR ISSUED RELIEF TO SUCH EFFECT, THIS ISSUE DOES NOT PROVIDE A BASIS FOR GRANTING CERTIORARI

As discussed above in the statement of the case, the Tenth Circuit specifically rejected precisely the reading of the law that petitioner would ascribe to it in its first question presented; to wit, that the gender composition

[31] Like this case, *Cook* was a lawsuit brought by individuals, and not a class action.

of the athletic program is required to mirror that of the student body. *See* Pet. App. C-11 n.5 ("[a]n institution is not required to maintain gender balance . . ."); *id.* at n. 6 ("We reject defendant's argument that the district court's decision implicitly requires CSU to maintain parity between women's athletic participation and women's enrollment."); *id.* at C-14 ("[a] Title IX violation may not be predicated solely on a disparity between the gender composition of an institution's athletic program and the gender composition of its undergraduate enrollment, *see* § 1681(b)"); *accord Cohen v. Brown Univ.*, 991 F. 2d at 895 ("[A] court assessing Title IX compliance may not find a violation *solely* because there is a disparity between the gender composition of an educational institution's student constituency, on the one hand, and its athletic programs, on the other hand.") (emphasis in original).

Nor did the Tenth Circuit order statistically-based relief. It simply affirmed the district court's reinstatement of the softball team. Indeed, the Tenth Circuit did not even ask whether such reinstatement would create an athletic program that had the same proportion of female participants as the female share of enrollment, although the facts of record suggest that it would not.[32]

Because the Tenth Circuit did not employ a test which required that the female rate of enrollment match the female rate of participation, and because the remedy ordered did not contemplate or achieve such a result, this

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[32] The district court addressed this question in dicta, suggesting that if CSU had added, in addition to the softball team, a women's soccer and alpine skiing team it would reach substantial proportionality. Pet. App. A-19. However, as the Tenth Circuit made abundantly clear, while nothing prevents CSU's female soccer players or skiers from bringing an action (which they have not), "[t]hat is not the lawsuit before us." Pet. App. C-21 n.15.

issue does not provide a basis for granting certiorari in this case.[33]

III. THIS CASE DOES NOT IMPLICATE THE FUTURE OF INTERCOLLEGIATE ATHLETICS, HOWEVER, CONGRESS DESIGNED TITLE IX TO REDRESS HISTORIC AND PERVASIVE SEX DISCRIMINATION IN EDUCATION-RELATED ATHLETICS

Because petitioner's legal arguments do not withstand scrutiny, it is left to complain as a matter of policy that this case must be of great national significance because, if permitted to stand, it will surely wreak havoc on college and high school athletics programs nationwide. Petitioner as dramatically overstates the impact of this case as it misstates the reasoning of the Tenth Circuit. Neither the future of varsity athletics in general, nor that of football in particular, hangs in the balance. Moreover, this is a policy issue to be decided by Congress and not the federal courts. All that is at issue here is whether the respondent-softball players were discriminatorily denied the opportunity to compete in varsity athletics at CSU, and upon the finding that they were, whether they were entitled to the reinstatement of their softball team.

However, even if this Court takes into consideration the broader problems of sex discrimination in varsity athletics, petitioner draws precisely the wrong inference when it contends that the Tenth Circuit's decision must be wrong because Congress cannot have intended to place numerous educational institutions at risk of violating federal law. Pet. 25, 28 n.31. To the contrary, Congress specifically designed Title IX to be "a strong and com-

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[33] Similarly, petitioner's reliance on *Kelley v. Board of Trustees of the Univ. of Ill.*, No. 93-1327, 1993 U.S. Dist. LEXIS 12256 (C.D. Ill. Sept. 1, 1993), is misplaced. Pet. 27-28 n.31. While the district court's decision in that case was surely correct, the issue of Title IX's application to the termination of a men's team, where men are the overrepresented sex among athletic participants, is nowhere presented in this case.

prehensive measure [that would] provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women." 118 Cong. Rec. 5804 (1972) (remarks of Senator Bayh, principal Senate sponsor).

With this end clearly in mind, Congress has, over the past twenty years, taken a number of steps to reaffirm its views on the importance and nature of Title IX's prohibition against sex discrimination in athletics:

1. In 1974, Congress rejected the "Tower" amendment which would have "exempted revenue-producing athletics [including football] from the jurisdiction of Title IX." Policy Interpretation, 44 Fed. Reg. at 71413.[34]

2. In that same year, through the enactment of § 844 of Public Law 93-380, Congress directed the Department of Health, Education and Welfare to publish proposed Title IX regulations including "reasonable provisions" covering intercollegiate athletics, having previously reserved to itself the right to disapprove all such regulations. *See supra* at 13 n.16.

3. Pursuant to this provision, Congress held wide-ranging hearings on the proposed Title IX regulations which focused on the question of athletics. *Sex Discrimination Regulations, Hearings Before the Subcommittee on Postsecondary Education of the Committee on Education and Labor*, 94th Cong., 1st Sess. (1975). These hearings documented in extensive detail the pervasive discrimination against women in intercollegiate athletics.

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[34] Petitioner's suggestion that there should be a "football exemption" under Title IX, Pet. 24 n.28, inexplicably disregards the clear legislative history demonstrating that Congress specifically rejected precisely such special treatment. It also disregards the enforcing agency's conclusion that "football or other 'revenue producing' sports cannot be exempted from coverage of Title IX." Policy Interpretation, 44 Fed. Reg. at 71421.

4. Although resolutions were introduced in both the House and the Senate to disapprove the Title IX regulations, none passed and the regulations went into effect. *North Haven*, 456 U.S. at 533.

5. Congress again addressed the subject of sex-discrimination in education-related athletics during the debates regarding the Civil Rights Restoration Act of 1987, which was introduced in response to the rule announced by this Court in *Grove City College v. Bell*, 465 U.S. 555 (1984). By narrowly construing the "program or activity" language in Title IX, *Grove City College* had severely restricted Title IX's coverage of athletics. The debates regarding the Restoration Act returned on many occasions to the question of sex-discrimination in athletics, and they reflect a remarkable consensus within Congress that sex discrimination in athletics is a serious and widespread problem that should be prohibited by federal law. *See Cohen*, 991 F.2d at 894 ("[T]he record of the floor debate leaves little doubt that the enactment was aimed, in part, at creating a more level playing field for female athletes.").[35]

In short, although this case presents only a narrow and fact-specific example of sex discrimination in intercollegiate athletics, Congress has, for twenty years, been well aware of the broader problem. It has taken numerous opportunities to protect and strengthen the prohibition against such discrimination, both in Title IX itself and in the enforcing agency's interpretations of Title IX, which form the basis of the Tenth Circuit's decision.

Thus, in the final analysis, petitioner's position reduces to the oft-repeated but long-discredited defense of discrimination: we are only doing what everybody else is doing. Both the district court and the Tenth Circuit rejected this

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[35] Because Title IX's contemporary prohibition of discrimination in athletics is based in substantial part on the authority of the Restoration Act, these debates are of particular importance in construing its meaning.

argument out of hand.[36] It is not an argument worthy of this Court's attention.

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[36] As The Tenth Circuit concluded, "[t]he fact that many or even most other educational institutions have a greater imbalance than CSU does not require a different holding." Pet. App. C-12; *see also* Pet. App. A-10 ("if defendants are found by this Court to be in violation of Title IX, the fact that CSU's participation statistics are better than those of other schools is of no legal consequence. . . . The issue of whether other universities are complying with Title IX is for other courts to decide based upon individualized allegations and independent findings of fact.").

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No. 93-559

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

COLORADO STATE BOARD OF AGRICULTURE,
Petitioner,

vs.

JENNIFER ROBERTS, et al.,
Respondents.

On Petition for Certiorari to
the United States Court of Appeals
for the Tenth Circuit

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER BY THE COMMONWEALTH OF PENNSYLVANIA, THE COMMONWEALTH OF PUERTO RICO, AND THE STATES OF ARIZONA AND NORTH CAROLINA

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QUESTION PRESENTED

I. Whether Title IX of the Education Amendments of 1972 requires that the gender composition of a university's athletic program mirror that of its student body?

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INTEREST OF THE AMICI

Amici states all operate systems of higher education which receive federal funds. In 1991, student enrollment in higher education reached 14,157,000.[1] Of these, over 10 million students were in public undergraduate colleges.[2] Over the next ten years, overall enrollment is projected to rise to 16,030,000 students with 12,478,000 enrolled in public colleges.[3] Amici thus serve the needs of a large number of the nation's college students. For this reason alone their interest in this case is strong. Added, however, is the consideration that continuing federal funding is essential to the maintenance of amici's educational

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[1] Digest of Eduction Statistics (1992), Table 2, page 11.

[2] Ibid.

[3] Id. Table 3, page 12.

systems. In 1992 federal expenditures on education was over 75 billion dollars.[4] A large portion of this was dedicated to higher education. In order to continue receiving these federal funds, amici must comply with Title IX, 20 U.S.C. § 1681, et seq. Because the resolution of this case will assist them in ensuring their compliance with the law, amici herein assert their interest.

As with most colleges and universities, amici's schools offer athletic competition as an extra curricular activity and, thereby come under the auspices of Title IX's requirements governing gender discrimination in intercollegiate athletics. The amici intend and desire fully to comply with Title IX, however,

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[4] Id. Table 348, page 369.

this task has grown more challenging with ever-increasing enrollments[5] and ever-shrinking budgets.[6] Recent decisions involving Title IX have added to this burden by generating controversy and confusion as to what the law requires. Lacking certainty, state educational institutions are finding it difficult to develop long-range plans for their athletic programs and to budget for the upcoming year.

Amici states have a significant interest in a resolution of the questions

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[5] Inasmuch as elementary and secondary schools are increasing in enrollment, Ibid. Table 41, pp. 52-53, it is likely that higher education enrollment will continue to swell.

[6] In the past year, there were 15 lawsuits filed asserting violations of Title IX in a university's athletic program. With each case, the issue arose when cutbacks in the budget forced the elimination of certain sports, usually equal numbers of men's and women's teams.

which have arisen concerning compliance with Title IX, in particular, whether they are required to maintain gender-based athletic programs which mirror the gender proportions of their student enrollment. Desirous of conforming to the law, amici states are seek guidance from this Court and urge that these matters be clarified for the benefit of the students and the student-athletes as well as the colleges and universities.

SUMMARY OF ARGUMENT

While the plain language of Title IX disavows basing a violation of its provisions solely upon a statistical disparity, the policy statement interpreting Title IX allows for a finding of noncompliance where the percentage of female athletes is not substantially proportionate with that of the female enrollment. In subsequent court decisions, the most recent of which is Roberts v. Colorado State Board of Agriculture, the proportionality requirement has been elevated to the determinant criteria. An educational institution desiring to satisfy Title IX thus is left to establish a system of preferential treatment for female athletes or be subject to litigation.

With this case, the Court can resolve the uncertainty surrounding the meaning of

the policy statement and return the proportionality standard to its rightful place as one factor to be examined in an assessment of a university's overall athletic program rather than as a goal to be achieved in and of itself.

ARGUMENT

I. TITLE IX's REJECTION OF A GENDER BASED QUOTA SYSTEM IS AT ODDS WITH THE DEPARTMENT'S POLICY STATEMENT AND THE RECENT DECISIONS OF THE COURTS.

In 1972, the United States Congress enacted Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, et seq., a broadly worded prohibition of gender-based discrimination in education programs or activities.[7] The Department of Education subsequently effected

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[7] Title IX provides in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .

20 U.S.C. § 1681(a)

detailed regulations implementing Title IX. 34 C.F.R. § 106.1, et seq. In these regulations, the Department outlines ten components of intercollegiate competition to be examined when assessing compliance with Title IX in college athletic programs. 34 C.F.R. § 106.41.[8] By the

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[8] 34 C.F.R. § 106.41(c) provides:

> (c)Equal Opportunity. A recipient . . . shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director [of OCR] will consider, among other factors:
>
> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
> (2) The provisions of equipment and supplies;
> (3) Scheduling of games and practice times;
> (4) Travel and per diem allowance;

end of July, 1978, it became apparent that there was widespread confusion regarding the requirements of Title IX and the regulations for intercollegiate athletic programs. The Department, therefore,

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(5) Opportunity to receive coaching and academic tutoring;
(6) Assignment and compensation of coaches and tutors;
(7) Provision of locker rooms, practice and competitive facilities;
(8) Provision of medical and training facilities and services;
(9) Provision of housing and dining facilities and services;
(10) Publicity.

Unequal aggregate expenditures . . . for male and female teams . . . will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

issued a Policy Interpretation of its regulations for use as guidance to university administrators for athletic programming. 44 Fed. Reg. 71, 413 et seq. (1979). The current dilemma over the meaning of Title IX has been created by the courts' interpreting the policy statement's interpretation of the regulations implementing Title IX. The more Title IX is interpreted, the more unclear its message becomes and the more it grows attenuated from its original meaning.

Title IX clearly states that nothing in its provisions "shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in . . . any

federally supported program or activity, in comparison with the total number or percentage of persons of the sex in any community." 20 U.S.C. § 1681(b). At its inception, Title IX, while it prohibited discrimination, specifically rejected the requirement that a university adopt a gender-based quota system. The implementing regulations, while not requiring a quota system, took a step away from Title IX's proviso by stating that a voluntary affirmative action plan would be acceptable to the Department, 34 C.F.R. § 106.3(b).

With specific regard to intercollegiate athletics, the Department, in its policy interpretation of the regulations, despite the plain language of Title IX, suggested that the effectiveness of an institution's accommodation of athletic interests and abilities (one of

the ten areas of examination pointed out by the regulations) be assessed by determining "whether intercollegiate level participation opportunities for male and female student's are provided in numbers substantially proportionate to their respective enrollments. 44 Fed. Reg. 71, 418 (1979).[9] This obvious tension between the statute and the policy interpretation has been augmented by recent court decisions. These have, in effect, required college and universities to establish quota systems giving preferential

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[9] Where substantial proportionality is not provided by an institution, the Department looks for a history and continuing practice of program expansion responsive to the interests and abilities of the underrepresented sex or for a demonstration that the current program fully and effectively accommodates the interests and abilities of the underrepresented sex. 44 Fed. Reg. 71, 418 (1979). As discussed, infra the meaning of these two additional steps has been muddied by case law assessing Title IX compliance.

treatment to women athletes, as the only "safe" way for an institution of higher education to avoid expensive and protracted litigation over its choice of athletic offerings.

Cohen v. Brown University, 991 F.2d 888 (1st Cir. 1993), was the first of the appellate decisions to attempt to reconcile the apparent discrepancy between the language of the statute and the language of its policy interpretation. In Cohen, the Court of Appeals first recognized that "a Title IX plaintiff in an athletic discrimination suit must accompany statistical evidence of disparate impact with some further evidence of discrimination, such as unmet need amongst the members of the disadvantaged gender." Id. at 895. The Court of Appeals, however, then observed that in its view "a university which does

not wish to engage in extensive compliance analysis may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup," Id. at 898; and instructed institutions that they must "remain vigilant . . . until the opportunities for, and levels of, competition are equivalent by gender." Id. at 898 (emphasis added). In sum, although the court begins by indicating that disparate impact alone is insufficient to prove a Title IX violation, it ends by setting equivalency by gender as the ultimate goal.

In Favia v. Indiana University of Pennsylvania, 812 F.Supp. 578 (W.D. Pa.), the District Court treated a violation of the policy interpretation's requirement of proportionality between the percentage of female athletes and the percentage of

female enrollment as a presumption of discrimination. The District Court placed the burden upon the university to rebut this presumption by proving that it satisfied one of the two remaining ways of assessing the provision of equal athletic opportunity, i.e., by showing program expansion defined as increasing the number of opportunities, or by showing that its program accommodated the interests and abilities of its students. Id. at 584-585. Favia required what Cohen required - a quota of female athletes based upon female enrollment.

In Roberts v. Colorado State Board of Agriculture, 998 F.2d 824 (10th Cir. 1993), the Court of Appeals describes the requirement of substantial proportionality as a safe harbor for colleges and universities, Id. at 829. Under this view, there is no need to further examine

an athletic program if the number of female athletes is substantially proportionate to the female enrollment. Roberts purports to disown the notion that an institution is required by Title IX to maintain gender balance. Id. at 829, fn. 5&6. Nevertheless, Roberts requires institutions to move toward athletic participation rates which are substantially proportionate to enrollment, Id. at 830; and concludes by holding that disparate impact alone is sufficient to establish discrimination under Title IX. Id. at 832-833.

With each decision, the confusion grows as the courts move toward the establishment of a de facto quota requirement which is directly at odds with the statute itself. As was stated by one Court, "Quite frankly, these interpretations have converted Title IX

from a statute which prohibits discrimination on the basis of sex (defined as the elimination of or exclusion from participation opportunities) into a statute which provides 'equal opportunity for members of both sexes.'" Kelley v. Board of Trustees of the University of Illinois, 1993 U.S. Dist. LEXIS 12256,*8 (M.D. Ill. 1993). The Court should take this opportunity to correct the course set by the courts below and return the proportionality standard to its rightful place as one factor to be examined in an assessment of a university's overall athletic program rather than as a goal to be achieved in and of itself and at the expense of all others.

Added to the above is the inability of a Title IX defendant to challenge in any meaningful way the statistical

comparison prescribed by the policy interpretation, in which the sole relevant comparison is between the percentage of female athletes and the percentage of female students. No allowance is made for students who lack athletic ability or who lack interest in participating in sports. See, Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 999 (1988) ("[S]tatistics based on an applicant pool containing individuals lacking minimal qualifications for the job would be of little probative value"). With no ability to rebut the relevance or accuracy of these statistics, there is effectively no ability to defend.

Under the current state of the law, then, a Title IX defendant is powerless to rebut a plaintiff's statistics, and yet this purported statistical imbalance may well be the sole criteria against which its program will be judged. This case

presents a clear opportunity to answer these questions. The amici states therefore urge this Court to resolve the confusion regarding the proper interpretation of the policy statement's proportionality requirement and its role in assessing a Title IX violation.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

COLORADO STATE BOARD OF AGRICULTURE
in its capacity as the governing board
of the Colorado State University,
Petitioner,

v.

JENNIFER ROBERTS, JULIE OSBORNE, JANET BRUMBELOW, LAURA BIELAK, SARA STOUT, AMY RECOUPER, JENNIFER JACOBS, MALIA KUENZLI, STACIE STAFFORD, HEATHER NAKASONE, KIM JOHNSON, AIMEE RICE AINSWORTH, and LISA MIZE, in their individual capacities,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF OF PETITIONER

Respondents' brief in opposition to certiorari is striking primarily for what it does not dispute. Respondents do not deny that the two courts of appeals that have addressed the issue whether a Title IX plaintiff must prove intentional discrimination reached *directly contrary* conclusions. As respondents concede "[i]n *Cannon* v. *University of Chicago*, 648 F.2d 1104, *cert. denied*, 454 U.S. 1128 (1981), . . . the Seventh Circuit concluded that Title [IX] prohibit[s] only *intentional* discrimination." Opp. at 14 (emphasis added). The Tenth Circuit, by contrast "conclu[ded] that intent is *not* a necessary element of a Title IX athletics violation." *Id.* at 12 (emphasis added). Thus, the conflict in the Circuits could not be plainer.

Similarly, at least in the expansive context of budget-motivated cutbacks, respondents do not dispute that the approach adopted below sanctions—indeed mandates—*intentional* gender-motivated discrimination against male student-athletes in direct contravention of the plain language of Title IX. See 20 U.S.C. § 1681(a) ("[n]o person . . . shall, on the basis of sex, be excluded from participation in . . . any education program or activity"). Indeed, respondents embrace as "surely correct" a lower court decision expressly recognizing as much and relying on the decision below in dismissing *as a matter of law* the claims of male student-athletes who alleged that their team was singled out for termination on purely gender-motivated grounds. See Opp. at 25 n.33 (citing *Kelley* v. *Board of Trustees of the Univ. of Ill.*, No. 93-1327[, 1993 WL 334771, at *6] (C.D. Ill. Sept. 1, 1993) ("Plaintiffs are requesting gender equity, or gender equality, in sharing the loss [of athletic opportunities]. This seems a fair request but conflicts with the imperatives of Title IX")).

Nor do respondents dispute that this case is of immense practical importance to educational institutions across the nation. Indeed, respondents do not even address the enormous and troubling impact of the decision below on the ability of financially strapped educational institutions to make decisions that best accommodate their students' edu-

cational and extracurricular needs within fiscal constraints —matters addressed at length in the briefs *amici curiae* filed by the Alabama Association of School Boards and the Birmingham Public Schools ("Public Schools Brief"), the American Council on Education, *et al.* ("Higher Education Brief") and the States of Arizona, North Carolina and Pennsylvania and the Commonwealth of Puerto Rico ("States Brief").

Instead, respondents primarily argue that they should prevail on the merits because the Seventh Circuit "reached the wrong conclusion" on the Title IX intent question. Opp. at 14. In large measure, this argument is based on an aggressive reading of this Court's fractured opinions in *Guardians Association* v. *Civil Service Commission*, 463 U.S. 582 (1983). There, a bare majority of this Court held with respect to *Title VI* that a federal agency's "implementing" regulations legitimately may proscribe, as discriminatory, conduct which the statute itself does not prohibit.[1] Respondents assert that this "logic" should be extended to the Title IX context. But the validity of the Seventh Circuit's decision and the proper scope of *Guardians* are precisely the important, unresolved issues that educational institutions need to have clarified and which

[1] Justices Stevens, Brennan and Blackmun held that although "proof of invidious purpose is a necessary component of a valid Title VI claim," plaintiffs have "only . . . to show that the [defendant's] actions were producing discriminatory effects in order to prove a violation of valid federal law." *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582, 642-45 (1983). Justices White and Marshall, in separate opinions concluded that both Title VI itself and the implementing regulations prohibit actions which have a disparate impact. *See id.* at 591 (opinion of White, J.); *id.* at 623 and n.15 (opinion of Marshall, J.). Now-Chief Justice Rehnquist and Justice O'Connor, in separate opinions, concluded that intent is required to prove a violation of either the statute or the implementing regulations. *See id.* at 612 (opinion of Rehnquist, J.); *id.* at 612-13 (opinion of O'Connor, J.). Finally, Justice Powell, joined by the Chief Justice, held that there is no private right of action under Title VI, and even if there were, plaintiffs must prove invidious intent whether suing under the statute or the implementing regulations. *See id.* at 610-11 & n.5.

are squarely raised by petitioners. Indeed, respondents' eagerness to argue the merits of interpreting Title IX to require equal outcome, rather than equal opportunity, including their strained efforts to divine congressional policy from post-enactment congressional *in*action,[2] merely underscore the need for immediate review.

1. In the Seventh Circuit, a Title IX plaintiff must prove gender-motivation, *i.e.*, that "discriminatory considerations were involved in the defendant's actions." *Cannon* v. *University of Chicago*, 648 F.2d 1104, 1110 (7th Cir.), *cert. denied*, 454 U.S. 1128 (1981). In the decision below, by contrast, the Tenth Circuit held that "the district court did not err here in failing to require proof of discriminatory intent." Pet. App. C-18. The existence of a clear circuit split on the substantive Title IX discrimination standard is indisputable. Given the undisputed and undisputable financial crisis facing the nation's educational institutions, it is simply unacceptable that the scope of a school's Title IX obligations should depend solely upon the part of the country where it exists

Respondents argue, however, that two prior decisions of this Court, one involving another statute, *Guardians Association* v. *Civil Service Commission*, 463 U.S. 582 (1983), and one that does not even address the substantive discrimination standard, *Franklin* v. *Gwinnett County Public Schools*, 112 S. Ct. 1028 (1992), tacitly "overruled" *Cannon*, thereby "resolving" the conflict. Contrary to the misleading impression created by the opposition, neither decision had any such effect.

In *Guardians*, this Court, as it subsequently explained, held that while "Title VI itself directly reached only instances of intentional discrimination . . . actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI." *Alexander* v. *Choate*, 469 U.S. 287, 293 (1985). Respondents assume, without explanation, that the same must be true of Title IX. On

[2] *See, e.g., Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 686 (1987) ("Congress' silence is just that—silence").

the contrary, even assuming the continuing validity of that questionable doctrine in the Title VI context, there is certainly no basis for *assuming* that it applies elsewhere. As this Court expressly recognized in *Alexander*, the only conceivable ground for the conclusion that "implementing" regulations may conflict with statutory language is a determination that *Congress* delegated this legislative power to the agency. The question is thus one of statute-specific legislative intent. And, the finding in *Guardians* that Congress intended to delegate to the Department of Labor, the Department of Justice, and the Department of Housing and Urban Development authority to expand the definition of illegal *race* discrimination prohibited by *Title VI* is therefore in no way relevant to the question whether Congress intended to delegate to the Department of Education authority to expand the definition of illegal *gender* discrimination under *Title IX*.

Moreover, even if this Court were to accept respondents' invitation to extend the *Guardians* approach to Title IX, both the plain language of Title IX, see 20 U.S.C. § 1681(b),[3] and the lack of any clear statement in the regulations, present formidable bars to any argument on the merits that Congress *did* in fact intend to delegate to the Department of Education authority to discard the stat-

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[3] [Nothing in Title IX] shall be interpreted to require any educational institution to grant preferential or disparate treatment to members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating . . . in comparison with the total number or percentage of persons of that sex in any community.

Having only pages earlier vigorously argued that Title VI sets the Title IX standard—and that *Guardians* is therefore dispositive—respondents next claim that the Court must look to Title VII to divine Congress' meaning. Then, recognizing that in order to prevail they need to rely on both Title VI and Title VII whenever convenient for the particular argument, they claim that "[i]t is not necessary to reach here the question whether Title IX is more like Title VI or Title VII." Opp. at 17 n.22. Respondents' confusion simply reflects the confusion that exists among the courts of appeals.

utory requirement that plaintiffs prove that the educational institution acted with improper gender-motivation. Respondents can (and do) argue that Title IX should be read as authorizing disparate impact regulations, but that is a decision that can only be made by this Court after full consideration of the issue. Unless, and until that happens—and petitioner urges the Court to address that difficult issue here—*Guardians* in no way resolves the conflict among the lower courts with regard to the substantive discrimination standard under Title IX.[4]

Nor is *Franklin* any aid in resolving that conflict. *Franklin* dealt only with the scope of remedies available to Title IX plaintiffs who have already proven unlawful intentional discrimination. See 112 S. Ct. at 1032 ("in this case we must decide what remedies are available in a suit brought pursuant to this implied right"). The issue of the appropriate substantive standard for determining *whether* unlawful discrimination has occurred was neither raised nor addressed in any way by the majority or the concurrence.[5]

Unable to dispute the existence of a circuit split on the necessity of showing gender motivation, respondents at-

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[4] Respondents imply that the court of appeals actually applied the *Guardians* rationale, finding a violation of the regulation and not the statute. On the contrary, the court expressly *rejected* the Title VI analogy and held that Title VII is "the most appropriate analogue when defining Title IX's substantive standards, including the question of whether 'disparate impact' is sufficient to establish discrimination under Title IX." Pet. App. C-18 (internal quotation omitted). The court then made clear its view that a plaintiff need not prove discriminatory intent to establish a violation of Title IX itself. *Id.* ("[b]ecause it is well settled that Title VII does not require proof of overt discrimination . . . the district court did not err here in failing to require proof of discriminatory intent").

[5] Because the *Franklin* Court did *not* decide whether Title IX's prohibitions extend beyond intentional discrimination, and because the Spending Clause, if applicable, may limit damages awards for unintentional violations, the Court necessarily limited its holding that damages are available to intentional discrimination of the sort at issue in that case. Respondents' strained attempt to interpret this as an implied holding that disparate impacts may violate Title IX is mere wishful thinking.

tempt to divert attention from that conflict by noting that the court of appeals left open the possibility that a purely statistics-based prima facie case of Title IX discrimination may be rebutted. That, of course, is entirely beside the point. True, a Tenth Circuit educational institution which, like CSU, acts with completely benign motivations may occasionally escape Title IX liability at trial by proving affirmatively that it has through economic boom and bust continually added womens' teams in an effort to reach statistical parity or that the interests and abilities of *all* potential female student-athletes have been fully satisfied. In the Seventh Circuit, however, an educational institution is entitled to judgment as a matter of law on a claim based upon statistics rather than evidence of improper motive. Only one of these approaches can be the correct one; the choice of approach is virtually always outcome-determinative;[6] and educational institutions have a right to know the regime under which they must operate.

That leaves only respondents' astonishing claim that there is no conflict because CSU *intentionally* discriminated against them. But neither the district court nor the court of appeals found any evidence of intentional discrimination. Moreover, respondents did not even offer any evidence to rebut the undisputed testimony that CSU's decision to terminate its baseball and softball programs—a decision that actually *benefitted* women, substantially

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[6] As the Higher Education Brief forcefully demonstrates, in practice, the Tenth Circuit standard requires no more than a showing of pure disparate impact. See Higher Education Brief at 4-5. The "continuing expansion" defense is available only to those institutions, if any, that can show that, from the mid-1970s to the present, they have continually and without pause worked to achieve statistical parity by adding female athletic participation slots, an especially rigorous standard given the reality of budget constraints and the fact that Title IX did not even apply to most athletic programs until March 22, 1988, when the Civil Rights Act of 1987 overruled this Court's conclusion in *Grove City College* v. *Bell*, 465 U.S. 555 (1984), that Title IX's prohibitions were intended to be program-specific. And, in practice, the "full accommodation" defense is *never* available, because the presence of aggrieved members of the terminated team is *always* sufficient to demonstrate that *their* interests and abilities are not fully accommodated.

increasing their share of athletic participation opportunities and providing additional resources for other female teams—was budget-motivated and that CSU took affirmative steps to assure itself that gender played no role in the decision process.[7]

Nevertheless, respondents assert that CSU's sports teams are facially sex-segregated, and therefore intent is established as a matter of law. In the courts below, respondents never challenged the sex segregation of CSU's sports teams. Indeed, their goal from the outset has been reinstatement of a sex-segregated softball team. Respondents challenged only CSU's decision to terminate softball, and it is undisputed that that decision was in no way gender-motivated. This case presents an ideal vehicle for resolving the circuit split on the issue of what, if anything, other than intentional gender-motivated discrimination, constitutes a violation of Title IX.

2. Respondents also fail in their efforts to downplay the split between the First and Tenth Circuits on the secondary issue whether a federal court may ever require an educational institution to fund a particular team on the basis of a program-wide statistics-based violation of Title IX. If disparate impact Title IX liability is ultimately upheld, this issue is of enormous importance to educational institutions.

Respondents make much out of the fact that the case at bar is an individual action while the First Circuit case was a class action. Accordingly, respondents argue, the team-specific remedy ordered below was necessary to "redress" respondents' injury. Neither court relied on that

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[7] *See, e.g.*, Tr. at 93 ("Your Honor . . . plaintiffs will stipulate that . . . there were severe financial problems at CSU during the [relevant] time period"); *id.* at 100-02 ("Q. What considerations did you look at in softball in terms of possibly eliminating it? A. . . . In respect to both baseball and women's softball, one of the extraordinary aspects of the sport . . . is that travel expenses were extraordinary. . . . [Also] there was an awful lot of time spent by both baseball and women's softball of the athletes away from the classroom") (testimony of CSU President Albert C. Yates).

distinction, however, and, in any event, respondents fundamentally misconceive the nature of the rights at issue.

Respondents perceive the decision below as "vindicat[ing] their right to play softball." Opp. at 22. Whatever the resolution of the intentional nonintentional discrimination question, however, it is plain that Title IX embodies no right to force an educational institution to fund a softball team. See *Cohen* v. *Brown Univ.*, 991 F.2d 888, 906 (1st Cir. 1993) ("Title IX does not require institutions to fund any particular number or type of athletic opportunities"). Title IX requires only that programs offered by educational institutions be free from gender discrimination. And when the claim is only that the "numbers" are "wrong," an educational institution obviously has a wide variety of options for getting the numbers "right" and thereby remedying the violation: the institution can add female participation slots in existing sports, add new female teams of whatever variety, cut existing male participation slots or entire teams, or even terminate its entire intercollegiate sports program. Thus, in this disparate impact context, individual plaintiffs and class action plaintiffs are on equal footing—neither was the victim of intentional discrimination, and neither is entitled to any specific relief. Because respondents prevailed only on program-wide statistical imbalance claims, any response by CSU that addresses the statistical imbalance complained of adequately redresses their injury, if not their nonexistent "right to play softball."[8] The conflict between the circuits on the proper remedy, and the fact that the remedy ordered below bears no relation to and does not remedy the statistical imbalance upon which liability was based, provide an independent ground for review of the decision below.

3. As noted above, respondents do not dispute that expanding the scope of Title IX liability to encompass disparate impact cases, as the court below did, will have

[8] By contrast, specifically ordering CSU to reinstate softball, as respondents concede, does *not* redress the claimed statistical violation. *See* Opp. at 24.

an enormous impact on educational institutions at all levels. The briefs *amici curiae* of the thousands of institutions actually dealing with the problem day-to-day—elementary, middle, and high schools, colleges and universities, conferences, associations, and States—amply demonstrate that the confusion surrounding the Title IX liability standard is a nationwide problem of exceptional importance.

In this regard, the Public Schools Brief provides a startling insight into the real world effects of the decision below. The Birmingham public school system is an inner city school system, which is so severely financially strapped that it recently was forced to fire all teachers' aides. In 1992, after a *six-year*, statistics-focused investigation, OCR found Birmingham's public schools in violation of Title IX. In response, the District agreed to conduct athletic interest surveys of its students.[9] Without exception, those surveys, which were *approved in advance by OCR*, showed that boys have a proportionately greater interest in participating in interscholastic sports than do girls. Indeed, interested boys outnumbered interested girls nearly two to one.

In light of the survey results and the plain language of Title IX, Birmingham proposed an equality of opportunity approach to Title IX compliance—*i.e.*, it proposed structuring sports offerings in light of budget constraints so that equal percentages of *interested* boys and *interested* girls could participate in interscholastic athletics. Thus, every interested student, regardless of gender, would have the same opportunity to participate. Explicitly relying on the decision below, OCR flatly rejected this approach in favor of strict *statistical* parity, regardless of relative interest. OCR concluded that one school, for example, must *fund* twelve new girls' teams, including a swim team, even

[9] Because elementary, middle and high school students interested in participating in interscholastic athletics programs are rarely "cut" from teams for lack of ability, for purposes of the survey, it was assumed that *all* students—male and female—have the ability to compete in any sport in which they express interest.

though the school has no swimming pool. See Public Schools Brief at 8-15.

What this one dramatic example makes clear is that confusion surrounding the decision below has already had a profound effect on the Title IX landscape, even at the kindergarten through twelfth grade level. The proper liability standard for Title IX is simply too important and affects too many educational institutions at too many levels to further postpone the inevitable day when these issues are resolved by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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